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Supreme Court of the United States

OCTOBER TERM, 1959

No. 545

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL., *Petitioners*,

v.

ATCHISON, TOPEKA & SANTA FE RAILROAD CO., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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ATCHISON, TOPEKA & SANTA FE RAILROAD CO., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Aircoach Transport Association, Inc., S.S.W., Inc., Regina Cargo Airlines, Inc., Air Cargo Express, Inc. and Aviation Corporation of Seattle, petitioners herein, pray that a writ of certiorari be issued to review (1) the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 25, 1958, as amended September 23, 1959, which vacated the judgment of the District Court for the District of Columbia

entered July 17, 1957 granting petitioners' motion for summary judgment and a permanent injunction under section 16 of the Clayton Act, 15 U.S.C. § 26 and (2) the Court of Appeals' order of September 23, 1959 denying petitioners' motion to recall and clarify the original mandate of the court below, said motion encompassing a request for appropriate alternative relief under 28 U.S.C. § 1651.

OPINIONS BELOW

The opinion of the Court of Appeals of February 25, 1958 is reported at 253 F. 2d 877 and is set out in Appendix "A," *infra*, pp. 31-47. The Court of Appeals' *per curiam* order of September 23, 1959 has not been officially reported, but is set out in Appendix "H" *infra*, pp. 60-61. The July 5, 1957 opinion of the district court (J.A.[1] 219-220) is reported at 154 F. Supp. 106. The February 24, 1959 opinion of the district court has not been officially reported, but is set out in Appendix "F" *infra*, pp. 55-59.

JURISDICTION

The judgment of the Court of Appeals was originally entered on February 25, 1958 (R. 250), but was subsequently amended by a *per curiam* order entered September 23, 1959. The nature of the subsequent amendment is discussed under *Reasons for Granting the Writ* at pp. 11-14, *infra*. The judgment of the Court of Appeals which petitioners also request this Court to review was entered September 23, 1959 (R. 466). A petition for rehearing *en banc* (R. 477) was denied on November 2, 1959 (R. 500). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] The letters "J.A." as used throughout refer to the Joint Appendix as printed for the use of the court below.

QUESTIONS PRESENTED

(1) Did this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, require that the courts in every case refer to the Interstate Commerce Commission a question as to the "intent and effect" of predatory practices conducted by persons subject to the jurisdiction of that agency, where the practices themselves are not subject to the Commission's regulatory jurisdiction?

(2) Did the Court of Appeals err in failing to hold in an action for injunction and treble damages under the antitrust laws that all "reduced rate" quotations under Section 22 of the Interstate Commerce Act necessarily are to be excluded from the antitrust immunity provisions of Section 5a of that Act?

(3) The Court of Appeals explicitly refused to pass on the questions whether the particular concerted section 22 practices here involved may validly be included (the question of law), or in fact are included (the question of fact), within any of respondents' agreements which the Interstate Commerce Commission had previously approved under section 5a of the Interstate Commerce Act. In view of the Court of Appeals' holding that the ICC had no jurisdiction to decide such questions under section 5a(7) of the Interstate Commerce Act, did that Court err in withholding decision thereon pending a reference of these same questions to the Interstate Commerce Commission?

(4) Where the Court of Appeals referred to the ICC the question whether the Commission, as a matter of law, had authority to immunize the practices complained of pursuant to section 5a of the Interstate Commerce Act, and the ICC declined to decide that question, did the court below err in then applying the doctrine of primary jurisdiction and in refusing to require the district court to decide that question of law?

(5) May a district court revise a mandate of a Court of Appeals because of a supervening decision by another panel of that Court in another case involving different parties where no application for a revision of the mandate is made to the Court of Appeals?

STATUTORY PROVISIONS INVOLVED

The statutes involved are section 22 of the Interstate Commerce Act, 24 Stat. 387, as amended by the Act of August 31, 1957, 71 Stat. 564, 49 U.S.C. § 22; section 5a of the Interstate Commerce Act, added by the Act of June 17, 1948, 62 Stat. 472, and codified as 49 U.S.C. § 5b; and section 5(d) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. § 1004(d). These statutory provisions are set forth in Appendix "I," *infra*, pp. 61-66.

STATEMENT OF THE CASE

A. Cause of Action and Parties

This is an action for an injunction and treble damages arising under the antitrust laws of the United States. Jurisdiction of the cause in the district court was based on sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209, 210 (15 U.S.C. §§ 1, 2 and 15), and on sections 4, 12 and 16 of the Clayton Act, 38 Stat. 731, 736, 737 (15 U.S.C. §§ 15, 22 and 26) (J.A. 3-4).

Petitioners (plaintiffs) are (1) four supplemental air carriers (common carriers by air, subject to the jurisdiction of the Civil Aeronautics Board and operating under authority granted by that agency), and (2) the Aircoach Transport Association, Inc., an incorporated association to which they belong (J.A. 4-6). Respondents (defendants) are twenty-nine of the major Eastern and Western passenger-carrying railroads of the United States and the Trunk Line Central Passenger Committee, Traffic Executives Association—Eastern Railroads (J.A. 6-13).

B. The Complaint

The complaint charges that as a result of increased utilization of the services of petitioners and other supplemental air carriers by the Department of Defense, respondents and their co-conspirators, since about April 1952, combined and conspired to force the supplemental air carrier industry out of the competitive military group passenger traffic market. Frustrated by the Defense Department in their efforts to reclaim through administrative fiat their heretofore enjoyed monopoly position in this market, respondents and their co-conspirators, all parties to a "Joint Military Passenger Agreement" (JMPA) with the government (providing for a uniform discount to the military establishment of 10% below filed commercial tariffs), in the summer and fall of 1953, acting in concert, agreed among themselves to depart from the standard 10% concession under the agreement in order to destroy the competition (J.A. 15-21).

Following studies of the rates and charges of the supplemental air carriers, respondents (non-connecting and competing rail carriers) agreed to and began to submit to the military establishment, through their agent-associations, variable "spot" and "packaged" rate quotations under section 22 of the Interstate Commerce Act *solely* over the main traveled competitive routes. These variable "spot" and "packaged" rate quotations were made on individual movements, and on a move-by-move basis, varying as low as fifty per cent and more below respondents' regularly filed tariffs (J.A. 21-23).[2]

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[2] By June 15, 1954, the Chairman, Western Military Bureau, under blanket discretionary authorizations from all the carrier members of the Trans-Continental, Southwestern and Western Passenger Association lines, was making "spot special Section 22 quotations on individual movements as they might arise * * * where * * * necessary to meet the competition" except that no bid was to be made "where the revenue, based upon short line of mileage, would return * * * less than 2.3 cents per mile" (J.A.

The predatory practices which respondents and their co-conspirators employed to freeze petitioners and others out of the military group passenger traffic market are essentially as follows: (1) concerted variable "spot" bidding to undercut the rates of the supplemental air carrier industry when competing with respondents (J.A. 21-22); (2) concerted "package" bidding on competitive movements of large numbers of military personnel on an all-or-nothing (less than 10% discount) basis (J.A. 22-23); (3) concerted attempts to influence the Department of Defense arbitrarily to divert traffic from the supplemental air carriers to respondents by administrative action (J.A. 23-24); (4) concerted attempts to persuade the Civil Aeronautics Board to eliminate supplemental air carriers from participation in any transportation and to abolish any existing operating authority enjoyed under the Civil Aeronautics Act (J.A. 25-26); (5) concerted attempts to persuade the Civil Aeronautics Board to deny supplemental air carriers authority to engage in domestic military group passenger traffic (J.A. 26); (6) concerted attempts to first block, and then delay certifications by the Civil Aeronautics Board of petitioners and others as "supplemental" air carriers (J.A. 25-27); and (7) concerted unfair competitive practices, including, but not limited to, a campaign of false and misleading propaganda (J.A. 27).

42, 142-145). Similarly, under blanket discretionary authority from the Trunk Line Central Passenger—Eastern Railroads, he was quoting rates as low as 2.1 cents per mile on special "spot" bids to the military under section 22—"a reduction of a little over 50 percent of the Eastern railroads' filed tariff rates" (J.A. 42-43). On traffic originating in the East and terminating in the West, the Chairman, Trunk Line Central Passenger Committee, joined "with the Trans-Continental and Western Passenger Associations in the quotation of Section 22 to the military, and make[s] one solid bid for all railroads that are going to participate in that traffic. For example, from Camp Kilmer, New Jersey, to Seattle, Washington, [he is] authorized to sign for [himself] for the Eastern carriers and for Chairman Padrick, for the Western carriers" (J.A. 43-44).

The history and activities of the conspiracy, its attendant predatory practices and the adverse effects upon petitioners are described in detail at pp. 34-56 of the joint appendix.

C. The "Special Arrangements" Clause.

Respondents' variable "spot" and "packaged" section 22 quotations were made under section 2a of Joint Military Passenger Agreement No. 29 (JMPA), an agreement entered into between respondents and the military establishment on July 1, 1952 (J.A. 104-117), and thereafter extended (J.A. 154-136). This agreement establishes a fixed deduction of 10% below respondents' commercial tariffs for the transportation of all military personnel covered thereunder (J.A. 108) except in the case of "special arrangements" (J.A. 107) which provided "the basis for [the] special section 22 quotations now under discussion which are in the nature of agreements supplementary to the standard concessions provided in the agreement" (J.A. 157-158).

D. Proceedings Below

The complaint (J.A. 2) was filed on April 10, 1957, together with a motion for preliminary injunction supported by affidavit and exhibits (J.A. 33). On May 31, 1957, respondents filed motions to dismiss or, in the alternative, for summary judgment, and submitted an affidavit in opposition to petitioners' motion for preliminary injunction (J.A. 79-102). On the same day petitioners cross-moved for summary judgment (J.A. 103) on the ground that there was no genuine issue as to any material fact and "plaintiffs are entitled to judgment as a matter of law except with respect to the amount of damages" (J.A. 103). On July 5, 1957, the district court filed a memorandum holding that petitioners' motion for summary judgment should be granted except with respect to the amount of damages

and that respondents should be enjoined (J.A. 219-220).[3] On July 17, 1957, the district court entered an order denying respondents' motions, granting petitioners' motion and permanently enjoining respondents under section 16 of the Clayton Act, 15 U.S.C. § 26 (J.A. 221) from continuing to make special "spot" variable and "packaged" rate quotations to the Department of Defense under section 22 of the Interstate Commerce Act for the transportation of military personnel in groups of fifteen or more when competing with petitioners (J.A. 220-223).[4]

Respondents filed notices of appeal on July 24, 1957 (J.A. 224). On February 25, 1958 the Court of Appeals vacated the judgment of the district court and remanded the cause for further proceedings not inconsistent with its opinion (App. "A," *infra*; pp. 31-47; 253 F. 2d 877). In accordance with the mandate and on April 18, 1958 the dis-

[3] The district court held: "1. The antitrust immunity conferred by Section 5a of the Interstate Commerce Act does not apply to concerted Section 22 quotations made to the United States Government; 2. The Interstate Commerce Commission has never immunized defendants' concerted Section 22 quotations; 3. The Interstate Commerce Commission does not have primary jurisdiction over the subject matter of this suit; 4. The concerted Section 22 quotations of defendants are illegal *per se* under the antitrust laws; 5. The defenses raised by the defendants are insufficient as a matter of law and there is no genuine issue as to any material fact" (J.A. 220).

[4] Petitioners' complaint and the issues presented here do not involve the propriety of joint-through rates under section 22 of the Interstate Commerce Act. The district court's order specifically provided:

"(c)(4) Nothing provided in subparagraphs (1), (2) or (3) above shall prevent or preclude defendants * * * from submitting any rate quotations, concertedly arrived at, for the transportation of persons for the Government of the United States at free or reduced rates, under and pursuant to section 22 of the Interstate Commerce Act, as amended, 49 U.S.C. 22, without regard to the level of the rates, where such rate quotations are made for through transportation between any two specific points over a single route, portions of which are operated by two or more railroads, nor shall the provisions of subparagraphs (1), (2) or (3) above require defendants * * * to discriminate as to such rate quotations between two or more railroads connecting with any defendant railroad in offering through transportation between any two specific points over a single route; * * *" (J.A. 222-223).

trict court entered an order providing that it would retain jurisdiction, but would withhold decision on the interpretation of the Interstate Commerce Act and respondents' existing agreements approved under section 5a of that Act, insofar as the challenged practices were concerned, until the ICC had an opportunity to decide initially whether, in its view, respondents could, with respect to those practices, be relieved of the operations of the antitrust laws under the statute, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date (App. "B," *infra*, pp. 48-49).

In its order of April 18 the district Court required appropriate proceedings be commenced before the ICC within 20 days. This was timely done. And on January 27, 1959 the ICC issued an order disclaiming jurisdiction of the question "as stated in the opinion of the Court of Appeals and in said order of the District Court entered April 18, 1958" whether respondents can, with respect to their challenged rate practices, be relieved of the operations of the antitrust laws under section 5a(9) of the Interstate Commerce Act. At the same time, the Commission ordered a hearing to determine "whether the challenged rate practices are, in fact, covered by one or more of the section 5a agreements which have been previously approved by [the Commission] * * *" (App. "C," *infra*, pp. 49-51).

In the meantime and on August 8, 1958 the Court of Appeals issued a *per curiam* order in *Atlantic Coast Line R. Co., et al.* v. *Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 657, in which it stated that this Court's decision in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, required a modification of the Court of Appeals' prior opinion in the *Aircoach* case (App. "D," *infra*, pp. 51-53). Subsequently the railroads in the *Riss* case petitioned the Court of Appeals for a clarification of the August 8th order, present petitioners being permitted to appear as *amici* in that proceeding. On December 16, 1958 the Court of Appeals issued another *per curiam* order clarifying its original order in *Riss* insofar as it affected the instant case (App. "E," *infra*, pp. 53-54).

On cross-motions to vacate and supplement the district court's order of April 18, 1958, the district court, on February 24, 1959, denied petitioners' motion to vacate and to proceed to decision on the question over which the Commission had disclaimed jurisdiction on January 27th. Instead the district court granted respondents' motion to supplement on the authority of *Atlantic Coast Line R. Co., et al.* v. *Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 657 (App. "F," *infra*, pp. 55-59). Thereupon the district court entered its order of March 2, 1959 providing that, while it would retain jurisdiction, it would "withhold decision on the question of violation by [respondents] of the antitrust laws until the Interstate Commerce Commission has had an opportunity to decide initially what was the intent and effect of the challenged rate practices of [respondents] * * *" (App. "G," *infra*, pp. 59-60).

On March 7, 1959 petitioners filed a motion in the Court of Appeals for recall and clarification of its mandate (R. 251) and requested that the court consider petitioners' motion as encompassing appropriate alternative relief in the nature of mandamus under 28 U.S.C. § 1651.[5] Oral argu-

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[5] Petitioners' "Motion for Recall and Clarification of Mandate" specifically pointed to the violation by the district court of the mandate of the court below (R. 257-258) and as "further grounds" for said motion (R. 261) petitioners stated "[p]erhaps the Court will consider that a Writ of Mandamus is the more appropriate remedy * * *. Any such alternative relief is clearly within the Court's power under 28 U.S.C. § 1651, and we ask that our motion be considered as encompassing such alternatives" (R. 267) to which respondents replied: "[Petitioners] also suggest * * * that this application be treated in the alternative as a petition for mandamus under the All-Writs statute (28 U.S.C. § 1651) [Appellants' Memo., March 23, 1959, p. 1] * * * [Petitioners'] alternative request for mandamus likewise should be denied. Review of interlocutory orders by mandamus is not a substitute for the normal review procedures provided by statute, and should be reserved for cases where the action of the lower court is plainly wrong. Far from being erroneous the action of the district court in this case is so plainly in compliance with the mandate and opinion of [the court below], as modified by its *Riss* orders, as to require the request for mandamus be denied out of hand." *Id.*, pp. 14-15.

ment was heard on April 9, 1959 before the same panel of the court which had heard and decided the original appeal. The cause was reargued on May 8, 1959, Judge Burger (a member of the panel in *Riss*) sitting in place of Judge Fahy (author of the *Aircoach* opinion) who had disqualified himself. On September 23, 1959 the court below issued a *per curiam* order denying petitioners' motion (App. "H," *infra*, pp. 60-61). Petitioners' subsequent motion to clarify or amend this order was denied on October 20, 1959, and a petition for rehearing *en banc* was denied on November 2, 1959.

REASONS FOR GRANTING THE WRIT

This case presents important and fundamental issues concerning the administration of the antitrust laws in the field of regulated industry. It involves both the doctrine of primary jurisdiction and the interpretation of the "Reed-Bulwinkle Act," 62 Stat. 472, 49 U.S.C. § 5b, as applied to non-regulated transportation rates under section 22 of the Interstate Commerce Act, 24 Stat. 387, 49 U.S.C. § 22. At the outset, and before turning to a consideration of the reasons for granting the writ, we think it important to dispel any doubts concerning this Court's jurisdiction to entertain it.

The Petition Is Timely Filed

The Court of Appeals' order of September 23, 1959 (App. "H," *infra*, pp. 60-61) substantially amended the opinion and judgment of that court entered February 25, 1958 (App. "A," *infra*, pp. 31-47; 253 F. 2d 877). Originally, the court below had held

> "We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of [respondents' challenged] practices for the purpose of eliminating the competition of Aircoach for the section 22 transportation involved * * *. Thus, on this aspect of the case, there remains a factual dispute. Moreover, this aspect of the case need

not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law." 253 F. 2d, at 887.

The district court's order of March 2, 1959 (App. "G," *infra*, pp. 59-60) was in direct violation of the mandate of the court below. It was, however, in accordance with a subsequent decision of another panel of that court in *Atlantic Coast Line R. Co.* v. *Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 657.[6]

By its action of September 23, 1959 denying petitioners' motion for recall and clarification of the mandate, and by permitting the district court's order of March 2, 1959 to stand (App. "H," *infra*, pp. 60-61), the court below required that the "intent and effect" of respondents' challenged practices be referred to the Interstate Commerce

[6] In its opinion of February 24, 1959 the district court stated: "With respect to the second aspect of the case in which the plaintiffs charge an effort by the defendants in combination or conspiracy to eliminate the competition of plaintiffs, the Court of Appeals held that this aspect need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law. After the decision of the Court of Appeals in this case, the Supreme Court decided *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, in the light of which the Court of Appeals in *Riss & Co., Inc.* v. *Atlantic Coast Line R. Co.*, held 'that the Isbrandtsen opinion modifies the holding of the Aircoach case by requiring that the issue of the intent and effect of an agreement approved by the Commission must, in a case where such issue is the sole or dominant issue in the case, first be referred to the Commission prior to a Court determination of whether such agreement violates the anti-trust laws.' Defendants have now moved to supplement the order of April 18, 1958, by including the intent and effect of the challenged rate practices of the defendants as issues which the Commission shall first have an opportunity to pass upon. While plaintiffs have not indicated a desire to proceed to hearing at this time on that aspect of the case in which they assert defendants' purpose to destroy competition, it remains in the case, and the Court is of the opinion that with respect thereto the issue of intent and effect is the sole or dominant issue. Accordingly, under *Isbrandtsen* and *Riss*, the issue of intent and effect must first be referred to the Commission" (App. "F," *infra*, pp. 57-58).

Commission prior to any court determination as to whether respondents violated the antitrust laws, thereby working a substantial amendment of the original opinion and judgment. Respondents can hardly challenge this conclusion since this was the position they successfully argued below.[7]

It is true, of course, that the form of the Court of Appeals' September 23, 1959 order is to deny recall and clarification of the mandate. But the *effect* of that order is virtually the opposite. Compare this Court's denial of certiorari in *Rogers* v. *Richmond*, 357 U.S. 220. In our view, the *form* of the order below is unimportant. It is "the effect of the ruling sought to be reviewed" which controls. Cf. *United States* v. *Hark*, 320 U.S. 531, 536. And since the effect of the Court of Appeals' September 23, 1959 order is to disturb and revise that which had been plainly settled in petitioners' favor by the original judgment entered February 25, 1958, a petition for a writ of certiorari seeking to review that judgment, as amended, is one which is "timely filed" within the meaning of 28 U.S.C. § 2101(c). *Federal Trade Commission* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 211-212; *Federal*

[7] Respondents' memorandum in opposition to petitioners' motion for clarification or amendment of the Court of Appeals' September 23, 1959 order makes this quite clear: "[T]he central theme of plaintiffs-appellees' argument was that Judge McGarraghy's order of March 2, 1959, supplementing his original order by including among the issues to be considered by the Interstate Commerce Commission the question of the intent and effect of the defendants' challenged practices, was in violation of the mandate of this Court. *This Court's order of September 23, 1959, plainly and unambiguously denied this motion and, accordingly, left Judge McGarraghy's orders as they stood.* * * * Finally, it does not seem to us that even a technical or formal amendment of this Court's order of September 23, 1959 is called for. As noted above, the order of Judge McGarraghy of March 2, 1959, of which the plaintiffs-appellees are still complaining, was in full accord with this Court's *Aircoach* decision, as that decision was specifically modified by the *Riss* orders. *Further 'correction' would be superfluous*" (Appellants' Memorandum in Opposition filed in the court below on October 3, 1959, pp. 4-5; emphasis supplied).

Power Commission v. *Idaho Power Co.*, 344 U.S. 17, 19-20; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 151.[8]

In the alternative, should this Court feel that merely because the court below did not specifically say so, the order of September 23, 1959 was not an amendment of the opinion and judgment of February 25, 1958, we respectfully request that the Court then consider the instant petition as a petition for a writ of certiorari to review the Court of Appeals' September 23, 1959 order. We believe that that order is so far a departure from the accepted and usual course of judicial proceedings as to require the immediate exercise of this Court's power of supervision. The action of the court below sanctioned a departure from the long-settled "strict mandate" rule. *E.g.*, *Gaines* v. *Caldwell*, 148 U.S. 228, 244. Moreover, unless this Court should hold either (1) that the Court of Appeals' action of September 23, 1959 constituted a substantial amendment of the prior judgment of February 25, 1958 or (2) that certiorari will lie from the September 23, 1959 order below, the Court of Appeals will have deprived petitioners of an opportunity to invoke the certiorari jurisdiction of this Court on a vital question of federal law by revising in another case matters previously settled in this one. Petitioners could not seek certiorari

[8] The order of September 23, 1959 substantially disturbed or revised the prior opinion and judgment in a number of other ways: (1) it altered the nature of the district court's "discretion" to refer the "questions of coverage by statute or approved agreement" (253 F. 2d, at 885-886) from "equitable discretion" under the *Tex-Mex* rule under which referral was required (328 U.S. 134, 151) to "authorized * * * to request the assistance of the [ICC]" (App. "H," *infra*, pp. 60-61) under which referral was purely discretionary; (2) it changed the sequence of decision by the district court on these questions in the event of an ICC disclaimer of jurisdiction to decide one or other of them; and (3) it created a genuine ambiguity as to whether these questions were separate and distinct or were one and the same. As formulated originally, the "question of coverage by approved agreement" was whether "a concerted plan for variable spot and package quotations" could be read into the "special arrangements" clause of JMPA No. 29. Compare 253 F. 2d, at 884 with App. "H," *infra*, p. 61.

from the decision in *Atlantic Coast Line R. Co., et al.* v. *Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 657, because they were not parties to it, and, except insofar as certain collateral issues may be involved, a review of the *Riss-Aircoach* conflict after petitioners have run the gamut of further proceedings before the ICC would be pointless. In these circumstances, we think the action of the court below not merely inconsistent with basic fairness (cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678, 681); it is a direct interference with petitioners' right to invoke this Court's certiorari jurisdiction.

I.

THE COURT BELOW HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

(a) By its action of September 23, 1959 (App. "H," *infra*, pp. 60-61) permitting the district court's order of March 2, 1959 to stand, the court below conformed its original holding in this case to a subsequent determination of another panel of that court in *Atlantic Coast Line R. Co.* v. *Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 657 (App. "F," *infra*, pp. 57-58). That decision in turn had held that this Court's holding in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 modified the original holding of the court below on the illegal purpose branch of the case (253 F. 2d, at 887)

> "by requiring that the issue of the intent and effect of a rate reduction claimed to be taken pursuant to procedures set forth in agreements approved by the Commission under sec. 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, must, in a case where such issue is the sole or dominant issue, first be referred to the Commission prior to a court determination of whether such rate reduction violates the anti-trust laws. The 'issue' referred to in the order was not intended to mean the issue of the applicability of sec. 5a agreements to the rate reductions." (App. "E," *infra*, p. 54.)

As a result, there is now an unresolved three-way division on this question among the judges within the circuit below. Compare the opinion of Judge Fahy in this case (253 F. 2d, at 887) with the *per curiam* order of December 18, 1958 in *Atlantic Coast Line R. Co.* v. *Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 657, 658, and then compare the February 24, 1959 opinion of Judge McGarraghy in this case (App. "F," *infra*, pp. 57-58) with the opinion of Judge Sirica in *Riss & Co., Inc.* v. *Association of American Railroads* (D.C., D.C.), 170 F. Supp. 354, at 364-366. The resulting confusion has been clarified neither by the order of September 23, 1959 in this case (App. "H," *infra*, pp. 60-61) nor by the order of May 19, 1959 denying the railroads' petition for certiorari or clarification in *Atlantic Coast Line R. Co.* v. *Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 659, 660.

Industry regulation, with its limited antitrust exceptions, industry-mindedness on the part of the regulatory agencies, and narrowly restricted judicial review of agency determinations already have had a formidable impact on competition. See, *e.g.*, Jaffe, *The Effective Limits of the Administrative Process: A Re-Evaluation*, 67 Harv. L. Rev. 1105 (1954). The addition of a judicial predilection for applying the doctrine of primary jurisdiction in antitrust cases, if carried too far, has grave implications for the survival of the national policy favoring competition in industries subject to federal regulation. See *Judicial Doctrine of Primary Jurisdiction as Applied in Antitrust Suits, Staff Report to Sub-committee No. 5*, House Judiciary Committee, 84th Cong., 2d Sess., 3 (1956). And in this case, the misapplication of *Isbrandtsen* to the allegations of the complaint charging respondents with an agreement, conspiracy and combination to destroy competitors is not only the furthermost extension of the primary jurisdiction doc-

trine made by any court to date,[9] it also vests in the ICC the *expertise* which Congress committed to a different regulatory agency.[10] Indeed, it gives to the agency supervising rail transportation the determination as to the life or death of airlines, to the exclusion of the only agency charged with responsibility in airline matters—the Civil Aeronautics Board.

In view of the basic differences between section 15 of the Shipping Act and section 5a of the Interstate Com-

[9] This is so because (1) the Interstate Commerce Commission has no jurisdiction over antitrust conspiracies; (2) it cannot grant any reparations for injuries already inflicted, since reparations are limited to violations of the Interstate Commerce Act (49 U.S.C. §§ 8, 9, 16(1, 2)) and respondents' concerted § 22 activities do not violate any section of the Act; (3) the Commission is powerless to prevent further injury because it lacks power to regulate § 22 quotations to the Government; and (4) unlike section 15 of the Shipping Act, 39 Stat. 733, 46 U.S.C. § 814, section 5a of the Interstate Commerce Act is permissive, conferring no *initial* jurisdiction upon the Commission beyond the terms and provisions of agreements which carriers may voluntarily submit to it for approval. *E.g., Eastern Railroads Agreements*, 277 ICC 279, 287 (1950). Moreover, a failure to *file* the conspiratorial agreement alleged in the complaint is not made a violation of the Interstate Commerce Act as it is in section 15 of the Shipping Act, and no remedy for such failure is provided by the former statute. Thus, railroads who enter into an agreement to eliminate competitors without filing it with the ICC cannot assert, as was done in *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 487 and *Far East Conference* v. *United States*, 342 U.S. 570, that the complaint alleges a violation of the regulatory statute for which the latter affords a remedy.

[10] The only administrative agency competent to measure the "effect" of respondents' challenged rate practices upon petitioners is the Civil Aeronautics Board. And the ICC has no jurisdiction to determine the "intent" of the challenged § 22 practices because the National Transportation Policy requires the ICC to administer the Interstate Commerce Act so as to prevent unfair or destructive competitive practices only between those modes of transportation subject to ICC regulation. Whatever the power of the ICC to determine the "intent and effect" of challenged § 22 practices where rail-truck competition is involved (the situation in the *Riss* case), it is patently clear that no such jurisdiction exists in the case of rail-air carrier competition. See Jaffe, *The Effective Limits of the Administrative Process: A Re-evaluation*, 67 Harv. L. Rev. 1105, 1114, 1121 (1954). Compare *Hawaiian Airlines* v. *Trans-Pacific Airlines* (D.C., Hawaii), 78 F. Supp. 1, 8-9.

merce Commission Act, the decision of the court below applying *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 to the illegal purpose branch of this case is an important question of federal law which has not been, but should be, settled by this Court. Resolution of this question is especially important where, as here, the decision below effectively frustrates antitrust enforcement in those areas of regulated industry not subject to agency control.[11] It becomes an imperative, where, as a result, there now exists: (1) an unresolved three-way division on the precise question among the judges within the circuit below; (2) a direct conflict in principle between the decision below and this Court's decisions in *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346-350; *Conley* v. *Gibson*, 355 U.S. 41, 44-45, and *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 455-462; and (3) a direct conflict in principle between the decision below, the third circuit's decision in *Seatrain Lines* v. *Pennsylvania R. Co.* (3 Cir.), 207 F. 2d 255, certiorari denied 346 U.S. 606, and the second circuit's decision in *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.* (2 Cir.), 227 F. 2d 60.[12]

(b) The district court originally held that "[t]he Interstate Commerce Commission has never immunized defendants' concerted 'Section 22 quotations'" (154 F. Supp. 106, 107) and the court below had said that "we do not ourselves find any clear provisions in any agreement which has been approved which applies to these practices. All agreements before us were approved by the Commission

[11] See, *e.g.*, H.R. 9762, 84th Cong., 2d Sess. (1956); H.R. 2142, 85th Cong., 1st Sess. (1957), and testimony of Hon. Stanley N. Barnes and Professor Louis B. Schwartz, *Hearings before the Antitrust Subcommittee of the House Judiciary Committee*, 84th Cong., 2d Sess. (*Monopoly Problems in Regulated Industries:* Pt. 1, Vol. 1), 47-50, 95-99 (1956). The problem is a repeatedly recurring one in the federal district courts; the latest example being *Overseas National Airways, Inc.* v. *Pan American World Airways, Inc., et al.* (D.C., D.C.), Civil Action No. 1878-59.

[12] The inter-circuit conflict in principle is discussed in Point III, *infra*, at pp. 25-27.

prior to 1953 when the competitive situation led the railroads to initiate these practices" (253 F. 2d, at 885). Indeed, the court below squarely held that the ICC does not have jurisdiction under section 5a(7) of the Interstate Commerce Act to determine whether such practices were taken in conformity with respondents' prior-approved 5a agreements (253 F. 2d, at 885). But it also held that that issue was nonetheless "appropriate for Commission consideration" because the agreements relied upon by respondents had ICC approval and were defended as authorized by the Interstate Commerce Act and the ICC's administration thereof (253 F. 2d, at 885).

The legislative history of the Reed-Bulwinkle Act, however, makes it clear that it is "not the * * * collective actions resulting from the [rate] association procedures that the bill contemplates will be submitted to the Commission for approval. What is to be submitted in such cases is the basic agreement setting up the association and defining the nature and scope of its activities and its mode of procedure." *H. Rep. No. 1100 on H.R. 221*, 80th Cong., 1st Sess., 12 (1947). In fact, Congress deleted a statutory provision which would have authorized the ICC to determine whether respondents' challenged rate practices were in conformity with their prior-approved 5a agreements, thereby negativing any jurisdiction in the ICC to determine this question.[13]

[13] The original version of section 5a(7), S. 110, 80th Cong., 1st Sess., as introduced and as passed by the Senate on June 18, 1947, contained, in addition to the language of the statute as enacted, a provision [cogently explained in *S. Rep. No. 41 on S. 110*, 80th Cong., 1st Sess., 15-16 (1947)], which provided as follows: "(7) * * * Any person, including the Attorney General of the United States, may make complaint to the Commission of any action taken under or pursuant to an agreement theretofore approved by the Commission and the Commission, upon such complaint or upon its own initiative, shall after hearing determine whether any such action is in conformity with such agreement and with the terms of the approval thereof by the Commission * * *." This provision was deleted in conference, however, after which the Senate conferees adopted the House version, as amended on the floor of the House of Representatives. *H. Conf. Rep. No. 2005*, 80th Cong., 2d Sess. (1948). This provision, as first reported out of

In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, this Court pointed out that it knew of "no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose." *Id.*, at p. 254. And in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, it cautioned against permitting the ICC to "accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly." *Id.*, at p. 475.

In the light of the foregoing, the decision of the court below on this aspect to the case must therefore turn on the scope of the ICC's power (absent adjudicatory jurisdiction under the Interstate Commerce Act) to issue declaratory orders under section 5(d) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. § 1004(d). And in the absence of ICC jurisdiction to determine whether respondents' challenged rate practices were in conformity with their prior-approved 5a agreements under section 5a(7) of the Interstate Commerce Act, we think the ICC without any power to issue a declaratory order in aid of a district court's jurisdiction by reason of section 5(d) of the Administrative Procedure Act. See *Attorney General's Manual on the Administrative Procedure Act*, 59-60, 128-129 (1947). The issue has never been decided by this Court. A similar problem involving the scope of the ICC's power to issue declaratory orders under section 5(d) of the Administrative Procedure Act in *excess* of its adjudicatory jurisdiction under its governing statute was not reached for decision in *Boston & Maine R. Co.* v. *United States*, 358 U.S. 68, but was left open.

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committee, *S. Rep. No. 1511 on H.R. 2536*, 79th Cong., 2d Sess., 14-15 (1947), was added to the House version of the bill (H.R. 2536) in the Seventy-ninth Congress to meet the specific objections of the Department of Justice and others. See, *Hearings, Senate Committee on Interstate and Foreign Commerce on H.R. 2536*; 79th Cong., 2d Sess., March 20-May 3, 1946, at pp. 54, 295, 425-426, 550, 718-719, 737, 803-804, 818-819, 821, 973, 977-979.

The importance of this question is readily apparent. Since 1951 the ICC has repeatedly asserted a power to issue declaratory orders under section 5(d) of the Administrative Procedure Act in aid of a district court's jurisdiction,[14] the curious result of which is to bind the referring court on all questions decided in the collateral administrative proceeding unless the agency's declaratory order is vacated in an appropriate statutory forum. Ailes, *Some Procedural Problems of Primary Jurisdiction*, 13 ABA Antitrust Section Report 82, 94-98 (1958); *Davidson Transfer & Storage Co.* v. *United States* (D.C., Md.), 164 F. Supp. 571, 573-574. Apparently the Commission has overlooked the introductory clauses of section 5 of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. § 1004, as well as the legislative history of section 5(d). *S. Rep. No. 752 on S. 7*, 79th Cong., 1st Sess., 18 (1945); *H. Rep. No. 1980 on S. 7*, 79th Cong., 2d Sess., 31 (1946). And in this and in other antitrust cases, the ICC's issuance of a declaratory order under section 5(d) of the Administrative Procedure Act in aid of the district court's jurisdiction under the antitrust laws (App. "C," *infra*, pp. 49-51), will transform the now clearly "advisory" purpose of the collateral administrative determination (App. "H," *infra*, pp. 60-61) into one which divests the district court of any effective antitrust jurisdiction. The question goes to the heart of the primary jurisdiction doctrine in the regulated industry-antitrust field; yet its answer remains unknown. See von Mehren, *The Antitrust Laws and Regulated Industry: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 960-961 (1954); Ailes, *Some Procedural*

[14] *Arizona Sand & Rock Co.* v. *Southern Pacific Co.*, 280 I.C.C. 285, 286 (1951); *Baumer Foods, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 287 I.C.C. 471, 473 (1953); *Colonial Lbr. Co., Inc.* v. *Reading Co.*, 291 I.C.C. 523, 524-525 (1954); *Chazen & Assoc.* v. *Alabama Great Southern R. Co.*, 296 I.C.C. 379, 381 (1955); *Central Montana Stockholders* v. *Chicago M., St. P. & P. R. Co.*, 299 I.C.C. 110, 111 (1956); *United States* v. *Guy A. Thompson, Trustee*, 299 I.C.C. 477, 478 (1956); 301 I.C.C. 231, 232 (1957); *United States* v. *Davidson Transfer & Storage Co.*, 302 I.C.C. 87, 89-93 (1957).

Problems of Primary Jurisdiction, 13 ABA Antitrust Section Report 82, 94-98 (1958). The decision of the court below on this aspect to the case raises a vital question of federal law which has never been resolved by this Court. In our view, the court below resolved it in a way in conflict with this Court's decisions in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, and *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464.

II.

THE COURT BELOW HAS DECIDED FEDERAL QUESTIONS IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

(a) While apparently recognizing that section 5a of the Interstate Commerce Act, 62 Stat. 472, 49 U.S.C. § 5b, was enacted to exempt from the antitrust laws those railroad activities over which the Interstate Commerce Commission had regulatory control,[15] the court below concluded that

> "the fact that section 22 reduced rates are not within the chief regulatory plan for commercial rates does not remove them from the Act entirely. The Commission itself has construed some of its regulatory power to apply to section 22 rates. Recently it held it had the power to require them to be filed, though it had not exercised the power * * *. And there is no compelling reason why the power of the Commission to approve an agreed approach to terms of carriage should not extend to carriage for the government at reduced rates" (253 F. 2d, at 882-883).

However, six days after the decision below this Court held that section 22 "exempts transportation for the United

[15] The court pointed out "that concert in proposing rates under agreements approved by the Commission was to be permitted because the Commission could control the rates proposed; absent such control it would be inconsistent with the Congressional plan to exempt rate practices from the antitrust laws; and such inconsistency would occur with respect to those spot and package bids reached in concert and offered to the military services as alleged in the complaint" (253 F. 2d, at 882).

States from the rate provisions of the [Interstate Commerce] Act." *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 543 ftn. 10. The view that section 22 rates are not within the rate provisions of the Interstate Commerce Act was shared by all members of this Court. *Id.*, 355 U.S., at p. 547. Even more recently, in *United States* v. *Radio Corporation of America*, 358 U.S. 334, this Court pointed out that immunity from the antitrust laws was co-extensive with pervasive rate regulation by the appropriate regulatory agency. *Id.*, at p. 349, ftn. 17. Since the Court of Appeals' ruling that "not all reduced rates under section 22 are necessarily to be excluded from concerted action under agreements approved by the Commission under section 5a(9)" (253 F. 2d, at 883) was bottomed on its holding that "the fact that section 22 rates are not within the chief regulatory plan for commercial rates does not remove them from the Act entirely" (253 F. 2d, at 882-883), it is clear that the court below has decided this question in a way in conflict with the recent decisions of this Court in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 and *United States* v. *Radio Corporation of America*, 358 U.S. 334.

(b) On January 27, 1959 the ICC disclaimed jurisdiction of the question of law whether respondents' challenged rate practices may validly be included within an agreement approved by the Commission under section 5a, but ordered that a hearing be held to determine "whether the challenged rate practices are, in fact, covered by one or more of the section 5a agreements which have been previously approved by [the] Commission * * *" (App. "C," *infra*, pp. 50-51). By its action of September 23, 1959 permitting the district court's March 2, 1959 order to stand, the court below held that, despite the ICC's disclaimer of jurisdiction, the district court should not proceed to decision on the question over which the ICC disclaimed jurisdiction but should await the ICC's determination concerning respondents' use of the challenged prac

tices for the purpose of eliminating the competition of petitioners for the section 22 transportation involved. The effect of this decision is to impose an improper, time-consuming, and expensive burden upon petitioners. As this Court has recently made clear, once the ICC disclaimed jurisdiction of the legal question of "coverage by statute," an ICC hearing and determination with respect to either (1) the factual question of "coverage by agreements" or (2) respondents' purpose to eliminate competitors would be wholly academic unless and until the district court first decided as a matter of law that respondents' challenged practices could be relieved of the operations of the antitrust laws under the statute. *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 414-415.

Apart from the compounding prejudice of delay and expense in an ICC proceeding presently academic (see *e.g., 1 Davis, Administrative Law Treatise*, 550 (1958); *Riss & Co., Inc. v. Association of American Railroads* (D.C., D.C.), 170 F. Supp. 354, at 368-369, certiorari denied *Atlantic Coast Line R. Co. v. Riss & Co., Inc.* (C.A.D.C.), 267 F. 2d 659), the relief petitioners sought below would have terminated the litigation on the merits.[16] On the other hand, further proceedings before the ICC will result in a declaratory order under Section 5(d) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. § 1004(d), depriving the district court of any effective jurisdiction under the antitrust laws, including its power under the mandate of the court below to "proceed *according to its own light* to interpret * * * the agreements" (253 F. 2d, at 886, emphasis supplied). *El Dorado Oil Works v. United States*, 328 U.S. 12, 18-19; *United States v. Railway Express Agency* (D.C., Del.), 101 F. Supp. 1008, 1012; *Davidson Transfer & Storage Co. v. United States* (D.C., Md.), 164 F. Supp. 571, 573-574.

[16] Except for respondents' counterclaims filed subsequent to the entry of the district court's order of July 17, 1957 (J.A. 219-223), the subject of the original determination below. (App. "A," *infra*, pp. 31-47.)

The instant case is much stronger than *River Terminals*, for another reason. In *United States* v. *Radio Corporation of America*, 358 U.S. 334, this Court held that the doctrine of primary jurisdiction did not apply to a civil antitrust suit under section 4 of the Sherman Act where no pervasive regulatory scheme or rate structure was involved, but that when an agency is permitted to exempt from antitrust coverage rates filed cooperatively, the primary jurisdiction doctrine applies equally to the attack on the conspiracy. *Id.*, at p. 347, ftn. 16. Thus, as distinguished from *River Terminals*, we are dealing here not merely with "sound and expeditious judicial administration." In this case the court below was *required* at the outset to decide the legal question whether the ICC was permitted to exempt from antitrust coverage respondents' challenged rate practices because this was the foundation question to be answered before the district court could determine whether or not the primary jurisdiction doctrine applied to the "conspiracy." Yet, in the face of the Commission's disclaimer of jurisdiction, this was precisely the question which the courts below refused to decide.

The determination of the court below that the district court should withhold decision on respondents' violation of the antitrust laws until the ICC first made a determination concerning respondents' use of the challenged practices for the purpose of eliminating competitors was in direct conflict with the recent decisions of this Court in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 and *United States* v. *Radio Corporation of America*, 358 U.S. 334.

III.

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT IN PRINCIPLE WITH DECISIONS OF THE THIRD AND SECOND CIRCUITS

By its action of September 23, 1959 (App. "H," *infra*, pp. 60-61), permitting the district court's order of March 2, 1959 to stand, the court below applied the doctrine of

primary jurisdiction to the allegations of the complaint charging respondents with an agreement, conspiracy and combination to destroy petitioners' competition for the section 22 transportation involved (App. "F," *infra*, pp. 57-58). In *Seatrain Lines* v. *Pennsylvania R. Co.* (3 Cir.), 207 F. 2d 255, certiorari denied 346 U.S. 606, the Third Circuit held that where the ICC had plainly ruled that it had no jurisdiction to regulate or control car interchanges between rail and water carriers in the absence of through routes between them, the doctrine of primary jurisdiction did not apply to an antitrust conspiracy denying Seatrain permission to use such rail carriers' freight cars. *Id.*, at p. 260. And in *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.* (2 Cir.), 227 F. 2d 60, the Second Circuit has held that where the question presented is whether or not a particular contract has been approved by the Federal Maritime Board, the doctrine of primary jurisdiction does not apply. The court said:

> "Thus it is clear from the record that there never has been approval of any conference agreement for preferential rates, as the Shipping Act clearly required. Such approval could not come subsequently, or retroactively, or by some interpretation of the Board made long after the event. * * * When all that remains is for the Court to say what the plain words of the statute mean and whether the Board has acted, the doctrine of primary jurisdiction does not apply. * * * On the facts before us the question of approval is no more difficult than the score of yesterday's baseball game; the court can read the score as well as the Board. To send the parties to the Board on these facts would only be useless and time-consuming." *Id.*, at p. 63.

In the instant case the complaint alleges that respondents' agreement, combination and conspiracy (J.A. 19-21), and the various predatory practices employed thereby (J.A. 21-27), was to undercut the supplemental air carriers' tariffs, to drive petitioners and other air carriers out

of the military group passenger market and to recapture the once dominant railroad monopoly position of carrying close to 100% of the total military traffic (J.A 21). Moreover, the ICC has repeatedly held that "[s]ection 5a is permissive only * * *. It confers no initial jurisdiction upon the Commission beyond the terms and provisions of particular agreements which carriers may voluntarily submit * * *." *Eastern Railroads—Agreements*, 277 ICC 279, 287 (1950).[17] Thus, since it is clear beyond question that respondents have never sought section 5a approval of the agreement, conspiracy and combination *alleged by the complaint* and since the Commission has plainly ruled that it has "no initial jurisdiction [to grant antitrust immunity] beyond the terms and provisions of particular agreements which carriers may voluntarily submit," the holding of the court below applying the primary jurisdiction doctrine to the agreement, conspiracy and combination *alleged by the complaint* is in direct conflict in principle with the Third Circuit's holding in *Seatrain Lines* v. *Pennsylvania R. Co.* (3 Cir.), 207 F. 2d 255, 260, certiorari denied, 343 U.S. 606, and the Second Circuit's holding in *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.* (2 Cir.), 227 F. 2d 60, 63.[18]

CONCLUSION

The issues which petitioners raise are of fundamental importance to antitrust enforcement in the regulated industry-antitrust field. The major importance of at least one of these issues— one which this Court is asked

[17] See also, *National Bus Traffic Association, Inc.—Agreements*, 278 ICC 147, 155 (1950); *Chicago Suburban Motor Carrier Association, Inc.—Agreements*, 288 ICC 415, 420 (1953); *Railroad Interterritorial Agreement*, 287 ICC 701, 706 (1953); *Niagara Frontier Tariff Bureau Inc.—Agreement*, 294 ICC 541, 547 (1955).

[18] It is also directly in conflict with Judge Forman's decision in *Slick Airlines, Inc.* v. *American Airlines, Inc., et al.* (D.C., N.J.), 107 F. Supp. 199, 207, 217, appeal dismissed (3 Cir.), 204 F. 2d 230, certiorari denied, 346 U.S. 806.

for the first time to decide—was recognized as early as 1954:

> "The legislative response to the *Georgia* decision [*Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439] was swift. By the Reed-Bulwinkle Act of June 17, 1948, Congress added Section 5b to the Interstate Commerce Act. That section conferred upon the ICC authority to approve rate association agreements voluntarily submitted to it. However, since this authority can only be exercised if the carriers submit the agreement, the effect of Section 5b upon the *Georgia* decision is open to dispute. Perhaps in cases similar to the *Georgia* case arising today the Supreme Court would hold that the doctrine of primary jurisdiction is inapplicable unless the agreement has been submitted to the ICC; perhaps changes in the membership of the Court would lead to the adoption of the position taken by the *Georgia* dissenters." von Mehren, *The Antitrust Laws and Regulated Industry: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 939 (1954).

On this question the district judge in *Aircoach* chose to follow the Court of Appeals' decision in *Riss* (App. "F," *infra*, p. 58). On the very same question the district judge in *Riss* chose to follow the Court of Appeals' decision in *Aircoach*. See *Riss & Co., Inc.* v. *Association of American Railroads* (D.C., D.C.), 170 F. Supp. 354, 364-366, certiorari denied (C.A.D.C.), 267 F. 2d 659, 660. Yet, the curious result of the Court of Appeals' action of September 23, 1959 was to leave the conflict between *that* court's *Riss* and *Aircoach* decisions unresolved, and unless this Court grants certiorari *now* — unreviewable.[19] With an issue this important, with a misapplication of this Court's decision in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 causing conflicts in principle between the decision below and decisions of this Court and

[19] Except, of course, to the extent that review may be had in accordance with the All-Writs statute, 62 Stat. 944, as amended, 28 U.S.C. § 1651(a).

of other circuits, and with the immediate frustration of antitrust enforcement in this field so apparent—surely, the question is one that this Court should decide.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 25, 1959.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14053-14056

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., *Appellants*

v.

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL., *Appellees*

Appeals from the United States District Court for the District of Columbia

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Decided February 25, 1958

Before WILBUR K. MILLER, BAZELON and FAHY, *Circuit Judges.*

FAHY, *Circuit Judge:* Plaintiffs in the District Court, appellees, hereinafter called Aircoach, are four supplemental air carriers and the Aircoach Transportation Association, Inc., to which they belong. They sued forty railroads and two unincorporated rate committees,[1] hereinafter jointly called the Railroads, appellants, for treble damages and a permanent injunction under the Clayton Antitrust Act,[2] alleging facts which would ordinarily constitute violations of sections 1 and 2 of the Sherman Antitrust Act[3] by reason of practices of the Railroads in

[1] Only twenty-nine railroads and one rate committee are appellants here.

[2] 38 Stat. 731, 737 (1914), 15 U.S.C. §§ 15, 26 (1952).

[3] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (Supp. IV, 1957).

connection with their charges for military traffic of the United States.

The case was decided by the District Court on cross motions for summary judgment, which were heard on the pleadings, exhibits and affidavits filed by the parties. The essential undisputed facts we think may be briefly summarized as follows:

During World War II and through 1948 the railroads handled some 97 per cent of the military passenger traffic. Beginning in 1949 buses and air carriers began to compete for this traffic. By 1954 the railroads' share dropped to 48 per cent and the nonscheduled air carriers received 34 per cent.

In 1953 the Railroads adopted two rate practices complained of in this action. One is the concerted quotation of "variable spot bids." Through a joint agent the Railroads bid for military traffic at variable rates which might drop to fifty per cent below their published commercial schedules. The joint agent acts not only for connecting but also for competing Railroads in offering the single price. The second practice is the making of "package bids," involving movements from a single starting point to a number of different destinations. The air carriers are unable to participate in portions of these movements because of the short distance involved, lack of airfield facilities, or size of the movement. The Railroads, through their joint agent, make "package bids" in which they agree to transport the military personnel in these movements on an "all or nothing" or "package" basis. The prorated bid of the Railroads might be higher than that of the air carriers on those portions of the movement where the latter are able to compete, but the Railroads receive the entire contract.

As the complaint alleges, since 1914 certain railroads have negotiated special rates with the military agencies of the Government for the transportation of personnel by overall contracts. The contract currently in effect, Joint Military Passenger Agreement No. 29, provides that the

railroads shall deal through joint agents and shall give the military agencies a standard reduction of ten per cent below commercial rates. The Agreement also provides that the railroads may make through their joint agent "separate special arrangements . . . more advantageous to the Government."

The Railroads raised several defenses of law, which may be summarized: (1) that the quotations complained of were made pursuant to section 22 of the Interstate Commerce Act[4] and have been immunized from the operation of the antitrust laws by an agreement approved by the Interstate Commerce Commission pursuant to section 5a of that Act.[5] Section 22 provides that nothing in the Act "shall prevent the carriage . . . of property free or at reduced rates for the United States . . . or the transportation of persons for the United States Government free or at reduced rates." Section 5a(2) provides that any carrier, subject to the Act, "party to an agreement between . . . two or more carriers relating to rates . . . may . . . apply to the [Interstate Commerce] Commission for approval of the agreement," and if such approval is forthcoming section 5a(9) relieves the parties thereto "from the operation of the antitrust laws with respect to the making . . . and . . . carrying out of such agreement . . . .". Further, the Railroads contend that agreements which the Commission had approved covered the challenged practices; (2) that the Interstate Commerce Commission has exclusive primary jurisdiction over the subject matter involved.

The District Court, granted the motion of Aircoach for summary judgment, leaving open, however, the amount of damages, and holding that the antitrust immunity of section 5a does not apply to concerted section 22 quotations, that the Interstate Commerce Commission does not

[4] 24 Stat. 387 (1887), as amended, 49 U.S.C. § 22 (1952). The part of § 22 pertinent at this point is now § 22(1) as a result of the Act of August 31, 1957, Pub. L. No. 85-246, 85th Cong., 1st Sess., 71 Stat. 564, discussed *infra*.

[5] 62 Stat. 472 (1948), 49 U.S.C. § 5b (1952).

have exclusive primary jurisdiction, and that the concerted section 22 quotations complained of are illegal per se under the antitrust laws. The court permanently enjoined the Railroads from offering to the military agencies variable spot rate and package rate quotations arrived at in concert. The injunction was limited, however, so as not to apply to such concerted quotations for through transportation over a single route operated by two or more railroads. This court suspended the injunction pending the appeals. The several appeals, consolidated in this court, are from the same order of the District Court.

We first consider whether any reduced rates permitted by section 22 may be made the subject of an agreement which the Commission may approve under section 5a. If not, and if the challenged practices are illegal per se, the judgment of the District Court should be affirmed.

No entirely convincing answer to the first of these questions seems possible as of the time of the order of the District Court. Shortly thereafter, by an Act effective August 31, 1957, Pub. L. No. 85-246, 85th Cong., 1st Sess., 71 Stat. 564, Congress amended section 22 to make clear that thenceforth the provisions of paragraph (9) of section 5a, carrying relief from the antitrust laws, should apply to quotations or tenders of rates, fares, or charges made under section 22. The Amendment, however, explicitly provides that nothing in it "shall affect any liability or cause of action which may have accrued prior to" its effective date. We accordingly must decide this case without regard to the Amendment, unless it bears somehow on the meaning of the pre-existing terms of the Act. As to this, on the one hand it refers to "quotations or tenders of rates, fares or charges" for the transportation of property or persons free or at reduced rates, which the Amendment now for the first time requires to be in writing or to be confirmed in writing, with a copy submitted to the Commission by the carrier. Only upon submittal of a quotation or tender made pursuant to an agreement approved under section 5a shall paragraph (9) of that section apply, with consequent relief from the antitrust laws. On the

other hand, the Amendment states that these provisions, presumably those of paragraph (9) of section 5a, "shall continue" to apply as to any such approved agreement under which any such quotation or tender was made prior to the Amendment. The several terms referred to would appear to neutralize the Amendment insofar as it bears on this case. See n. 14, *infra*.

The general scheme of the Interstate Commerce Act is that rates, fares, and charges shall be filed with the Commission[6] and shall not be changed when filed and published except upon thirty days notice to the Commission and to the public,[7] and, when schedules stating a new rate, fare, or charge are filed, that there is authority in the Commission either upon complaint or upon its own initiative to suspend the same.[8] These provisions illustrate the general plan for regulation and supervision of rates for public protection; and this plan is not applicable to the questioned section 22 practices used by the Railroads during the period here involved.[9] Aircoach accordingly urges that those practices are not rates which may be the subject of an agreement approved under section 5a, as Congress did not mean to exempt from the antitrust laws concerted action with respect to rates which are not subject to the regulation and supervision of the Commission.

[6] 24 Stat. 381 (1887), as amended, 49 U.S.C. § 6(1) (1952). Transportation generally is forbidden unless rates have been filed therefor. 34 Stat. 587 (1906), as amended, 49 U.S.C. § 6(7) (1952).

[7] 24 Stat. 381 (1887), as amended, 49 U.S.C. § 6(3) (1952).

[8] 36 Stat. 552 (1910), as amended, 49 U.S.C. § 15(7) (1952).

[9] See *Southern Pac. Co.* v. *United States*, 272 U.S. 445, 448; *Southern Pac. Co.* v. *United States*, 62 Ct. Cl. 391, 399-400; *Illinois Cent. R.* v. *United States*, 58 Ct. Cl. 182, 184; *Thompson* v. *Baltimore & O.R.*, 59 F. Supp. 21, 35-38 (E.D. Mo.), *modified on other grounds*, 155 F. 2d 767 (8th Cir.); *United States* v. *Southern Pac. Co.*, 25 I.C.C. 255, 258. And see *United States* v. *Union Pac. R.*, 28 I.C.C. 518, 524; *In re Contracts for Free Transportation*, 16 I.C.C. 246, 249.

Legislative history,[10] in addition to the general scheme of the Act, is cited to support this position.[11] Representative Bulwinkle, in explaining the section 5a provisions, which took his name, indicated they would not permit two carriers to bypass the Commission in establishing rates; the carriers would still be required to file their rate proposals with the Commission, which was not so with respect to section 22 rates prior to the Amendment of August 31, 1957. The Commission was to retain power to determine whether or not the rate proposals should be placed in effect.[12] See statement of Senator Reed at 94 Cong. Rec. 6642 (1948); statement of Senator Myers, 94 Cong. Rec. 6657 (1948); statement of Representative Wolverton, 94 Cong. Rec. A-3926 (1948); and explanation of Representative Bulwinkle, 94 Cong. Rec.

[10] The pertinent legislative history is that of the Bulwinkle-Reed Bill the enactment of which in 1948 brought Section 5a into the law. The companion bills were S. 110 and H.R. 221, 80th Cong. (1947-48).

[11] H. Conf. Rep. No. 2005, 80th Cong., 2d Sess. (1948); S. Rep. No. 44, 80th Cong., 1st Sess. 4, 13 (1947); H.R. Rep. No. 1100, 80th Cong., 1st Sess. 11-12 (1947); S. Rep. No. 1511, 79th Cong., 2d Sess. 36 (1946); 94 Cong. Rec. 5627-32, 5635, 5640-41, 6642, 6653, 6657, A-3926, A-4032-34 (1948); 93 Cong. Rec. 6592, 6595-96, 6701-05 (1947); 92 Cong. Rec. 10241, 10257, 10269-70 (1946); 91 Cong. Rec. 11749-50, 11755-56 (1945); Hearings, Senate Committee on Interstate and Foreign Commerce on H.R. 2536, 79th Cong., 2d Sess. 41-42, 70, 116-21, 158, 174, 228-29, 267, 1157 (1946); Hearings, Senate Committee on Interstate and Foreign Commerce on H.R. 2536, 79th Cong., 2d. Sess. 9, 101, 1380 (1946); Hearings, Senate Committee on Interstate and Foreign Commerce on S. 942, 78th Cong., 1st Sess. 870-76, 878 (1943); Hearings, House Committee on Interstate and Foreign Commerce on H.R. 221 and S. 110, 80th Cong., 1st Sess. 33-34, 83-84 (1947). See also H. Rep. No. 2633, 84th Cong., 2d Sess. 2 (1956); S. Rep. No. 1655, 83d Cong., 2d Sess. 4-5 (1954); S. Rep. No. 1683, 82d Cong., 2d Sess. 5 (1952); Hearings, Senate Interstate and Foreign Commerce Committee, on S. 377, S. 378, S. 937, S. 939 and S. 943, 85th Cong., 1st Sess. 39 (1957).

[12] 94 Cong. Rec. 5629 (1948).

A-4032-34 (1948).[13] All these references support the view that concert in proposing rates under agreements approved by the Commission was to be permitted because the Commission could control the rates proposed; absent such control it would be inconsistent with the Congressional plan to exempt rate practices from the antitrust laws; and such inconsistency would occur with respect to these spot and package bids reached in concert and offered to the military services as alleged in the complaint.[14]

Nevertheless, we think the general statutory scheme referred to does not necessitate a conclusion that no section 22 reduced rates may be concertedly offered under the authority of an agreement approved by the Commis-

[13] Representative Bulwinkle said that the Bulwinkle-Reed bill, does not give carriers the right to fix rates . . . Under the bill the carriers have only the right they now have to propose rates to the ICC. The power to fix rates remains in the Interstate Commerce Commission.

. . . . The only actions of regulated carriers which are declared to be not subject to the antitrust laws are such actions as are themselves subject to complete regulations in the public interest by the Interstate Commerce Commission—a situation totally different from that applying to unregulated business.

The purpose of the antitrust laws is to protect the public from price fixing at the hands of private business. But in the field of transportation this protection is already provided through Government price fixing by the Interstate Commerce Commission.

94 Cong. Rec. A-4032-33 (1948).

[14] The fact that Congress in the 1957 Amendment found it necessary to bring § 22 rates within at least some supervision of the Commission when they explicitly stated that § 5a applies to § 22 rates lends support to this contention. Support can also be had from Representative Bulwinkle's statement that the reason a House amendment to the original senate bill was adopted to limit the § 5a immunity provision to rates rather than extend it to matters of service to the public, as originally proposed, was that it was felt that agreements to curtail service would not be subject to ICC control and that immunity from "the restraint of the antitrust laws would leave this area of carrier activity covered by neither law." 94 Cong. Rec. A-4033 (1948).

sion under section 5a. Though not subject to the same regulation as commercial rates, all section 22 terms for governmental carriage are not, for that reason, altogether beyond concerted action permissible under section 5a. The Act is designed primarily for commercial traffic. Section 22 is apart from this primary design. It is a concession to the Government.[15] But the fact that section 22 reduced rates are not within the chief regulatory plan for commercial rates does not remove them from the Act entirely. The Commission itself has construed some of its regulatory power to apply to section 22 rates. Recently it held it had the power to require them to be filed, though it had not exercised the power. See statement of the Commission in *Ex Parte 192, Reduced Rates Under Section 22, Special Filing Rule*, 299 I.C.C. 417. Reparations have been awarded with respect to them when they have been found to be excessive. *Police Jury of Caddo, La.* v. *St. Louis S.W. Ry.*, 78 I.C.C. 235. And there is no compelling reason why the power of the Commission to approve an agreed approach to terms of carriage should not extend to carriage for the Government at reduced rates. Reduced rates for transportation incident to our huge defense establishment should not, unless the Act clearly so requires, be left altogether beyond the reach of the Commission's power to approve agreements with respect to transportation. We find no statutory language, and no emanation from the statute as a whole, which requires this. We are fortified in this view by the fact that the Commission has heretofore approved agreements under section 5a containing references to section 22 rates. See, for example, Art. XV, § 1(j), Articles of Organization and Procedure of the Western Traffic Association, contained in ICC docket Section 5a Application No. 2; Art. II, § 13(d), Agreement of Eastern Railroads, contained in ICC docket Section 5a Application No. 3, 276 I.C.C. 183, 277 I.C.C. 279.[16] Furthermore, upon the

[15] *Southern Pac. Co.* v. *United States*, 62 Ct. Cl. 391, 399-400.

[16] See also the following approved agreements, which in their full text can be found only in their respective dockets: *Illinois Freight Ass'n—Agreement*, Section 5a Application No. 21, 283

basis of extensive testimony in committee hearings on section 5a, bearing on its possible application to section 22 "rate adjustment"[17] or reduced rates for war materials, the House and Senate Committee Reports pointed out that the evidence was convincing that the joint organizations maintained by the carriers were not only necessary to enable them to meet the commercial requirements of the nation but also were indispensable to the requirements of national defense. This appears to refer to testimony at the hearings urging continued protection for the railroads from the antitrust laws, as had existed under Certificate No. 44 of the War Production Board prior to the enactment of section 5a, so that the defense establishment could continue to obtain reduced rates under section 22. H.R. Rep. No. 1100, 80th Cong., 1st Sess., 11; S. Rep. No. 44, 80th Cong., 1st Sess. 12 (1947).

We resolve the ambiguous situation by holding as a matter of statutory construction that not all reduced rates under section 22 are necessarily to be excluded from concerted action under agreements approved by the Commission under section 5a, and therefore left unprotected from the operation of the antitrust laws under section 5a(9). The holding of the District Court to the contrary we think is error.

It does not follow, however, that the practices here involved may validly be included, or in fact are included, within any agreement which has been approved under section 5a.

The Railroads say that the Commission has decided that the practices have been validly permitted by agree-

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I.C.C. 17; *Southern Freight Ass'n—Agreements*, Section 5a Application No. 6, 283 I.C.C. 245; *Southern Ports Foreign Freight Comm.—Agreement*, Section 5a Application No. 19, 284 I.C.C. 775; *Railroad Interterritorial Agreement*, Section 5a Application No. 26, 287 I.C.C. 701. And see *All American Airways, Inc. v. Abilene & Southern Ry.*, 297 I.C.C. 313, 316.

[17] Hearings on H.R. 2536, House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., pp. 389-90 (1945).

ments it has approved,[18] citing *All American Airways, Inc.* v. *Abilene & Southern Ry.*, 297 I.C.C. 313. There certain air carriers complained to the Commission that practices like those now attacked were contrary to the national transportation policy, particularly the policy regarding unfair or destructive competitive practices and the national defense. The Commission dismissed the complaint, holding in the end that complainants showed no injury, in which circumstance it also held it could not say the procedures assailed constituted unfair or destructive competitive practices or contravened the national transportation policy. In the course of its decision, however, the Commission said the practices had been approved as the result of meetings of the passenger associations and committees "as provided in the section 5a agreements," that in arriving at the amount of reductions "in their special section 22 quotations to the military, the railroads apparently have followed strictly the procedures approved in the section 5a proceedings" which the complainants contended were not contemplated by the Congress in enacting section 22, nor by the Commission in approving agreements under section 5a.[19] The Commission also referred to the fear of complainants that it was the collusive intention of the Railroads to make future bids below out-of-pocket cost in order to destroy rather than to meet competition; in other words, "to drive the airlines out of business, and then restore their fares to their former level." "But," said the Commission, "this conclusion cannot properly be drawn from statements referred to nor from any of the other evidence presented."[20]

It is not clear to us that the Commission decided in *Abilene* that the practices were within section 5a in the

[18] The allegedly approved agreements referred to are those collected at note 16, *supra*.

[19] 297 I.C.C. at 316.

[20] *Id.* at 318. Allegations of a similar nature, hereinafter referred to, are contained in the papers filed by Aircoach in the District Court in this case.

contemplation either of Congress or of the Commission. That the Railroads used procedure approved by the Commission does not mean that practices thus arrived at were validly the subject of such procedure. Some types of section 22 reduced rates, such as a discount at a fixed percentage below commercial rates, might be within Act and agreement, yet a procedure validly applicable to the reaching of such a reduced rate, when used for these other practices, would not bring the latter within either Act or agreement. And we do not ourselves find any clear provision in any agreement which has been approved which applies to these practices. All agreements before us were approved by the Commission prior to 1953 when the competitive situation led the Railroads to initiate these practices.[21] Joint Military Passenger Agreement No. 29, the current contract between the military services and the Railroads, can be of little help. It is not a section 5a agreement approved by the Commission and, moreover, while it provides that the Railroads are free to make through their joint agent "separate special arrangements" more advantageous to the Government than the usual ten per cent reduction, it is by no means certain that a concerted plan for variable spot and package quotations is to be read into that provision. In any event the Commission has not dealt with the provision in that context.

The Railroads vigorously contend at this point that the question whether or not the practices can be or are covered by any section 5a agreement is within the exclusive primary jurisdiction of the Commission. They rely principally upon section 5a(7), here set forth in the margin.[22] We do not read that provision as do the Rail-

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[21] See agreements cited at note 16 *supra*.

[22] (7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2), or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and,

roads. It seems to us to authorize the Commission to determine whether an agreement which it has approved, or the terms and conditions of its approval, conforms with the standard set forth in paragraph 5a(2), or whether such terms and conditions are not necessary for that purpose, and to determine that either the approval, or the terms and conditions of the approval, should be modified to bring about conformity with such standard. The standard referred to is the "furtherance of the national transportation policy declared in this Act . . .," found at 49 U.S.C., preceding section 1. The policy there declared, to be somewhat repetitious, is *inter alia* to encourage the establishment and maintenance of reasonable charges without "unfair or destructive competitive practices," all to the end of developing a national transportation system "to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." From this it appears that, should the challenged practices be thought by the Commission to be unfair or destructive competitive practices or otherwise inconsistent with the policy of the Act, section 5a(7) would militate against approval of any agreement authorizing them. This is quite different from saying that the practices when engaged in by the Railroads could have been or in fact were authorized by any approved agreement. Section 5a(7) is not in terms or, we think, in meaning a provision for the determination of either of those questions. Compare *S.S.W., Inc.* v. *Air Transport Ass'n*, 89 U.S. App. D.C. 273, 191 F.2d 658.

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after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions no necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

Aircoach, contending against the exclusive primary jurisdiction of the Commission, points to *Petition of Household Goods Carriers Bureau, Inc.*, ICC Docket No. 32154, of May 9, 1957. There the Commission held that an issue as to immunity from the antitrust laws based on the provisions in section 5a(9), "with respect to any particular action between carriers parties to such agreements, or by such parties with carriers not parties," is not within the jurisdiction of the Commission at all. It is not clear to us that the Commission meant to disclaim jurisdiction over any question of coverage whenever an antitrust charge is made. The Commission might have considered that even were a rate or practice covered there would remain the question whether it were validly covered and, therefore, protected by section 5a(9), and that this was a matter for the courts. Or the Commission might have had in mind that a practice which could validly be adopted in concert might nevertheless offend the antitrust laws when used as a weapon to destroy competition, and that this was for the courts. As *Abilene* is not in our view a definitive Commission decision that the practices here involved can be or are covered, so *Household Goods* is not a definitive decision against the Commission's capacity to determine those questions.

Nevertheless, the questions are appropriate for Commission consideration, even though, as we believe, exclusive primary jurisdiction over either of them does not reside in the Commission by reason of section 5a(7). Compare *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 48. The agreements relied upon by the Railroads had Commission approval. While the challenged practices arose subsequently to such approval, and seriously affect another industry, they arose nonetheless in the industry with respect to which the Commission has expertise and large responsibilities, and they are defended as authorized by the Commission's governing statute and by its administration thereof. In this situation, "the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 566, 567; *Thompson* v. *Texas Mexican*

Ry., 328 U.S. 134, 151. In each of these cases the Supreme Court directed the District Court to suspend its own decision pending opportunity for administrative action by the appropriate agency, and in *Thompson* the agency was the Interstate Commerce Commission. Cf. *United States* v. *Western Pac. R. Co.*, 352 U.S. 59; *Capital Transit Co.* v. *Safeway Trails, Inc.*, 92 U.S. App. D. C. 20, 201 F. 2d 708.

In short, the court, while retaining jurisdiction, should in its discretion withhold decision on the interpretation of the statute and existing agreements approved under section 5a, insofar as the challenged practices are concerned, until the Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be relieved of the operations of the antitrust laws under the statute and, if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date. The Commission might disclaim jurisdiction, or for some other reason might refrain from deciding these questions. We do not hold that it is required to decide them. The court could then proceed according to its own light to interpret either the statute or the agreements.

The foregoing assumes that the practices bring the Railroads into violation of the antitrust laws unless relieved of their operation by virtue of section 5a(9). The District Court held the practices to be illegal per se. We agree, unless they are so relieved.

The practices constitute a system of price-fixing in concert by competing, nonconnecting carriers. We are unable in law to distinguish such concerted fixing of charges and conditions for transportation from price-fixing of commodities, see *Georgia* v. *Pennsylvania R.*, 324 U.S. 439; cf. *United States* v. *Yellow Cab Co.*, 332 U.S. 218, and we emphasize that the practices enjoined are not those of connecting carriers for through transportation, but those which result from concert between competing and nonconnecting carriers. These carriers agree

among themselves, through their joint agent, on a charge within a certain range.[23] This is price-fixing among competitors and as such is illegal per se under the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150; *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 458; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392. To be illegal, prices need not be inflexibly set at any one point, but

> prices are fixed . . . if the range within which purchases or sales will be made is agreed upon . . . . They are fixed because they are agreed upon.

United States v. *Socony-Vacuum Oil Co.*, *supra* at 222; see *Swift & Co.* v. *United States*, 196 U.S. 375.[24]

The Railroads contend that what occurs is price-cutting, which is not per se condemned by the antitrust laws, citing *Schine Chain Theaters, Inc.* v. *United States*, 334 U.S. 110. There the cutting of prices was by a combination of ownership interest at theaters they owned or in which they had a financial interest; here the so-called price-cutting is agreed upon between competitors. See 334 U.S. at 120-21, where the Court said there was "a bare finding that at times Schine [the group] cut admission prices," lacking the element that the practice "was in purpose or effect employed as an instrument of monopoly power."

The package bids, besides being bids at fixed prices, are accompanied by a condition that the Government must give certain specified traffic to the Railroads which other

[23] The range does not permit a discount of more than 50% below the commercial rate.

[24] The fact that section 22 provides that "nothing in this chapter shall prevent the . . . transportation of persons for the United States Government free or at reduced rates . . ." we think does not affect the question of concerted fixing of reduced rates among competitors. The permission granted to the carriers to transport for the Government free or at reduced rates is not a permission to competitors to agree upon a particular rate or a rate within a particular range.

wise might go to Aircoach. This condition is also illegal per se, for the Supreme Court has found per se illegality where one who has a monopoly in one place uses it to acquire exclusive privileges where he has competitors. *United States* v. *Griffith*, 334 U.S. 100; *International Salt Co.* v. *United States*, 332 U.S. 392.[25]

One further substantive legal question must be considered. Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9). We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of Aircoach for the section 22 transportation involved. See, by analogy, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809; *Georgia* v. *Pennsylvania R.*, *supra* at 458; *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416, 422 (10th Cir.); *Noerr Motor Freight, Inc.* v. *Eastern R.R. Pres. Conf.*, 155 F. Supp. 768, 814-16, 822-25 (E.D. Pa.); *Parmelee Transp. Co.* v. *Keeshin*, 144 F. Supp. 480, 484 (N.D. Ill.); *Noerr Motor Freight, Inc.* v. *Eastern R.R. Pres. Conf.*, 113 F. Supp. 737, 742-44 (E.D. Pa.); *Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F. Supp. 199, 214 (D.N.J.), *appeal dismissed sub nom. Slick Airways, Inc.* v. *Forman*, 204 F. 2d 230, (3d Cir.), *cert. den.*, 346 U.S. 806; *United States* v. *Association of American Railroads*, 4 F.R.D. 510, 526 (D. Neb.). In the District Court allegations and verified statements were made on behalf of Aircoach to the effect that the practices enjoined were in purpose employed by Railroads to eliminate the competition of Aircoach. Notwithstanding this, both Aircoach and Railroads moved for sum

[25] If the quantity of traffic were material we think there could be no doubt that it is so substantial, and the Railroad's control of it so great, that the antitrust decisions referred to have application.

mary judgment. In the circumstances we construe each motion as a claim by the movant that it was entitled to judgment as matter of law on those facts which were undisputed. The motion of Railroads is not to be construed as admitting factual allegations in regard to a purpose to destroy competition which would have the legal result of removing Railroads from any possible protection from the antitrust laws; nor can Aircoach's motion be construed as abandoning those allegations. Thus, on this aspect of the case, there remains a factual dispute. Moreover, this aspect of the case need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law.

There thus arises a matter of procedure. As to this, a discretion must be left to the District Court after hearing the parties. It might be considered preferable, if Aircoach desires to pursue the assertions regarding a purpose to destroy competition, that this branch of the case should be the subject of a hearing, limited to that problem. Should Aircoach prevail Railroads would be liable in damages, and an appropriate injunction also could be granted. Or proceedings in the District Court on this subject could await reference to the Commission of the questions of coverage by statute or approved agreement.

We will dissolve the injunction at this time. We think this follows from a proper temporary balancing of competing considerations. Should it be held ultimately that there are violations of the antitrust laws the Railroads can be made to respond in damages and the propriety of an injunction can be reconsidered. We realize that there is no entirely satisfactory solution to the problem of an injunction at this stage of the litigation, but on the whole the one we adopt is perhaps better for the time being. Since we have stayed the injunction pending the appeals, the stay will be ended, being replaced now by dissolution of the injunction itself.

The judgment of the District Court will be vacated and cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 875-57

AIRCOACH TRANSPORT ASSOCIATION, INC., ETC., ET AL., *Plaintiffs*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ETC., ET AL., *Defendants*.

Order

In accordance with the mandate of the United States Court of Appeals for the District of Columbia Circuit filed in this Court on the 14th day of March, 1958, it is

ORDERED that the judgment of this Court entered on the 17th day of July, 1957 be and the same is hereby vacated and set aside; and it is further

ORDERED that this Court, while retaining jurisdiction, shall, in its discretion, withhold decision on the interpretation of the Interstate Commerce Act and existing agreements approved under section 5a of said Act, insofar as the challenged practices are concerned, until the Interstate Commerce Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be relieved of the operations of the anti-trust laws under the statute, and, if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date; and it is further

ORDERED that a certified copy of the complaint filed herein, of the opinion in *Atchison, Topeka & Santa Fe Railway Co., etc., et al.* v. *Aircoach Transport Association, Inc., etc., et al.*, Nos. 14053-6, United States Court of Appeals for the District of Columbia Circuit, decided February 25, 1958, and of this order be filed in the proceedings to be instituted

before the Interstate Commerce Commission which are to be commenced by one or more of the parties hereto within 20 days of this date.

s/ JOSEPH C. McGARRAGHY
Judge

April 18, 1958

APPENDIX "C"

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 27th day of January, A.D. 1959.

No. 32415

PETITION FOR DECLARATORY ORDER—MILITARY PASSENGERS—SECTION 5a AGREEMENTS

This Commission having under consideration the petition dated April 22, 1958, of certain railroads listed in Appendix A thereto for a declaratory order under the provisions of Section 5(d) of the Administrative Procedure Act (5 U.S.C., Section 1004(d)) and Section 5a of the Interstate Commerce Act; motion dated April 26, 1958, of Aircoach Transport Association, Inc., and certain air carriers which are members of said Association, to dismiss said petition of April 22, 1958; petition dated April 26, 1958, of Aircoach Transport Association, Inc., Air Cargo Express, Inc., Aviation Corporation of Seattle, Inc., Regina Cargo Airlines, Inc., and S.S.W., Inc., for disclaimer of jurisdiction or, in the alternative, for other relief in the nature of a declaratory order; and replies by each group of petitioners;

And it appearing, That the railroad petitioners are among the defendants, and the air carrier petitioners are the plaintiffs, in *Aircoach Transportation Association, Inc., et al., v. Atchison, Topeka and Santa Fe Railway Co., et al.*, Civil Action No. 875-57, a civil antitrust suit pending in the United States District Court for the District of Columbia, in which that Court determined adversely to said railroad

petitioners that certain of their rate practices violate the Sherman Antitrust Act (15 U.S.C., Sections 1 and 2); that several appeals were taken from the judgment of the District Court and were consolidated in the United States Court of Appeals for the District of Columbia (*Atchison, Topeka and Santa Fe Railway Co. et al.* v. *Aircoach Transport Association, Inc., et al.*, Nos. 14053-14056); that the Court of Appeals vacated the judgment of the District Court and remanded the cause, stating that the District Court, while retaining jurisdiction, should withhold decision until this Commission has had an opportunity to decide initially certain questions, and further stating that this Commission might disclaim jurisdiction, or for some other reason refrain from deciding said questions; that on April 18, 1958, the District Court entered an order in accordance with the mandate of the Court of Appeals, directing the parties to institute proceedings before this Commission:

And it further appearing, That said questions as stated in the opinion of the Court of Appeals and in said order of the District Court entered April 18, 1958, are (1) whether the railroad petitioners can, with respect to the challenged rate practices, be relieved of the operations of the antitrust laws under Section 5a(9) of the Interstate Commerce Act, and (2) if so, whether they have been relieved by any agreement approved by this Commission under Section 5a, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date;

It is ordered, That the petition of certain railroads dated April 22, 1958, be set for hearing at a time and place to be hereafter designated so far as it seeks a determination as to whether the challenged rate practices are, in fact, covered by one or more of the Section 5a agreements which have been previously approved by this Commission and to which the railroad petitioners refer in said petition, and that said petition be in all other respects denied, for the reasons that said question, involving an interpretation of the scope of agreements which this Commission has approved and a determination of whether the procedures contained in said agreements were adhered to, is appropriate

for administrative determination in aid of the Court and that the first question set forth in the immediately preceding paragraph hereof is a question of law which is not dependent upon factors within the special competence of this Commission;

It is further ordered, That the motion to dismiss dated April 26, 1958, is denied and the petition for disclaimer of jurisdiction is granted to the extent indicated in the first ordering paragraph above, and otherwise denied, for the reasons indicated in said first ordering paragraph.

By the Commission.

HAROLD D. McCOY
Secretary.

(SEAL)

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term 1958

No. 14,562

District Court Civil Action No. 4056-54

Filed August 8, 1958

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,

v.

RISS & COMPANY, INC., *Respondent*

Before: BAZELON, BASTIAN and BURGER, Circuit Judges.

Order

This case came on for consideration on the order of the District Court entered May 26, 1958, denying petitioners' motion to suspend proceedings pending a determination by the Interstate Commerce Commission of whether prior Commission-Approved agreements are applicable to the re-

duced rate agreements referred to in Paragraph 18 of the Complaint as supplemented, whether such rates are otherwise lawful and whether respondents have abused the processes of the Commission, on petitioners' motion to file a petition for writ of certiorari, petitioners' petition for writ of certiorari, petitioners' brief in support thereof, respondent's brief in opposition thereto, the transcript of proceedings in the District Court and on arguments of counsel.

Whereas the order of the District Court is not a final order appealable under 28 U.S.C. § 1291 nor an interlocutory order appealable under 28 U.S.C. § 1292, and it appears that petitioners sufficiently allege a conflict of jurisdiction between the District Court and an administrative agency, and sufficiently show that postponed appellate review may work hardship on petitioners, *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202, 203 (1945), and

Whereas it appears, from the District Court's memorandum opinion in support of the order, that the District Court relied upon the decision of this court in *Atchison, Topeka & S. F. Ry. Co.* v. *Aircoach Transport Assn.*, ... U.S. App. D.C. ..., 253 F. 2d 877 (1958), and did not consider in its opinion the effect of *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499 (decided May 19, 1958), and

Whereas it is the view of this court that the *Isbrandtsen* opinion modifies the holding of the *Aircoach* case by requiring that the issue of the intent and effect of an agreement approved by the Commission must, in a case where such issue is the sole or dominant issue in the case, first be referred to the Commission prior to a court determination of whether such agreement violates the anti-trust laws, and

Whereas it is the view of this court that the *Isbrandtsen* decision does not necessarily require referral to the Commission of issues such as those sought to be referred to the Commission by petitioners' motion where the agreement is

only one of a considerable number of overt acts alleged and where the policy favoring referral is clearly outweighed by other factors such as the probability of undue delay and the overriding importance of early consideration of the other overt acts alleged, and

Whereas the District Court, having considered this case in all of its aspects, is in a better position to determine where, on balance, suspension of proceedings is warranted,

It is hereby, *ordered* that petitioners' motion for leave to file a petition for writ of certiorari and petitioners' petition for writ of certiorari are *granted*, and the case is *remanded* to the District Court with directions to vacate its order of May 26, 1958, and to reconsider petitioners' motion to suspend proceedings in light of this order.

Per Curiam.

Dated: August 8, 1958

APPENDIX "E"

UNITED STATES COURT OF APPEALS

September Term, 1958

No. 14,562

U.S. Court of Appeals for the District of Columbia

Filed December 16, 1958

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Petitioners*,

v.

RISS & COMPANY, INC., *Respondent*.

Before: BAZELON, BASTIAN and BURGER, Circuit Judges, in Chambers.

Order

This case came on for consideration on petitioners' motion for clarification of an order of this court in this

cause dated August 8, 1958, respondent's reply thereto, the motion of Aircoach Transport Association, Inc., et al. for leave to file a memorandum of law as amicus curiae and to participate in oral argument, the lodged memorandum of Aircoach Transport Association, Inc. et al., and respondent's reply to the motion of Aircoach Transport Association, Inc. et al.

It appears therefrom that the order of August 8, 1958, did not fully set forth the view of this court concerning the effect of *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499 (1958) upon the decision of this court in *Atchison, Topeka & S.F. Ry. Co.* v. *Aircoach Transport Assn.*, ... U.S. App. D.C. ...., 253 F. 2d 877 (1958). The intent, however, of the order of August 8 was to assert our view that the *Isbrandtsen* opinion modifies the holding of the *Aircoach* case by requiring that the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Section 5a of the Interstate Commerce Act, must, in a case where such issue is the sole or dominant issue, first be referred to the Commission prior to a court determination of whether such rate reduction violates the anti-trust laws. The "issue" referred to in the order was not intended to mean the issue of the applicability of sec. 5a agreements to the rate reductions.

It is therefore ORDERED that petitioners' motion for clarification of the order of August 8, 1958, is granted, to the extent indicated in the foregoing paragraph.

It is FURTHER ORDERED that the motion of Aircoach Transport Association, Inc. et al. for leave to file a memorandum of law as amicus curiae is granted, but its motion for oral argument is denied.

Per Curiam.

Dated: December 16, 1958

APPENDIX "F"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 875-57

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL., *Plaintiffs*,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL., *Defendants*.

Memorandum

The Court is of the opinion that plaintiffs' motion to vacate the order of April 18, 1958 must be denied.

The Interstate Commerce Commission has disclaimed jurisdiction to pass upon the question of law, but is proceeding to a hearing on the issues of fact stated in the order.

In my opinion, the opinion and mandate of the Court of Appeals in this case require that this Court withhold decision on the interpretation of the existing agreements, insofar as the challenged practices are concerned, until the Commission has had an opportunity to decide the issues raised in the petition now pending before it.

The following passages from the opinion of the Court of Appeals, in my opinion, require this ruling:

> "Nevertheless, we think the general statutory scheme referred to does not necessitate a conclusion that no section 22 reduced rates may be concertedly offered under the authority of an agreement approved by the Commission under section 5a. Though not subject to the same regulation as commercial rates, all section 22 terms for governmental carriage are not, for that reason, altogether beyond concerted action permissible under section 5a. The Act is designed primarily for commercial traffic. Section 22 is apart from this

primary design. It is a concession to the Government. But the fact that section 22 reduced rates are not within the chief regulatory plan for commercial rates does not remove them from the Act entirely . . . ."

. . . .

"We resolve the ambiguous situation by holding as a matter of statutory construction that not all reduced rates under section 22 are necessarily to be excluded from concerted action under agreements approved by the Commission under section 5a, and therefore left unprotected from the operation of the antitrust laws under section 5a(9) . . . ."

. . . .

"It does not follow, however, that the practices here involved may validly be included, or in fact are included, within any agreement which has been approved under section 5a."

. . . .

"The Railroads vigorously contend at this point that the question whether or not the practices can be or are covered by any section 5a agreement is within the exclusive primary jurisdiction of the Commission. They rely principally upon section 5a(7), here set forth in the margin. We do not read that provision as do the Railroads. It seems to us to authorize the Commission to determine whether an agreement which it has approved, or the terms and conditions of its approval, conforms with the standard set forth in paragraph 5a(2) or whether such terms and conditions are not necessary for that purpose, and to determine that either the approval or the terms and conditions of the approval, should be modified to bring about conformity with such standard . . . ."

. . . .

"Nevertheless, the questions are appropriate for Commission consideration, even though, as we believe, exclusive primary jurisdiction over either of them does not reside in the Commission by reason of section

5a(7). Compare *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 48. The agreements relied upon by the Railroads had Commission approval. While the challenged practices arose subsequently to such approval, and seriously affect another industry, they arose nonetheless in the industry with respect to which the Commission has expertise and large responsibilities, and they are defended as authorized by the Commission's governing statute and by its administration thereof. In this situation, 'the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue' . . . ."

. . . . . .

"In short, the court, while retaining jurisdiction, should in its discretion withhold decision on the interpretation of the statute and existing agreements approved under section 5a, insofar as the challenged practices are concerned, until the Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be relieved of the operations of the antitrust laws under the statute and, if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date. The Commission might disclaim jurisdiction, or for some other reason might refrain from deciding these questions. We do not hold that it is required to decide them. The court could then proceed according to its own light to interpret either the statute or the agreements."

The foregoing relates to the practices which this Court has held are illegal *per se* and the Court of Appeals agreed unless they are relieved by virtue of section 5a(9).

With respect to the second aspect of the case in which the plaintiffs charge an effort by the defendants in combination or conspiracy to eliminate the competition of plaintiffs, the Court of Appeals held that this aspect need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law.

After the decision of the Court of Appeals in this case, the Supreme Court decided *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, in the light of which the Court of Appeals in *Riss & Co., Inc. v. Atlantic Coast Line R. Co.*, held "that the *Isbrandtsen* opinion modifies the holding of the *Aircoach* case by requiring that the issue of the intent and effect of an agreement approved by the Commission must, in a case where such issue is the sole or dominant issue in the case, first be referred to the Commission prior to a Court determination of whether such agreement violates the anti-trust laws."

Defendants have now moved to supplement the order of April 18, 1958, by including the intent and effect of the challenged rate practices of the defendants as issues which the Commission shall first have an opportunity to pass upon.

While plaintiffs have not indicated a desire to proceed to hearing at this time on that aspect of the case in which they assert defendants' purpose to destroy competition, it remains in the case, and the Court is of the opinion that with respect thereto the issue of intent and effect is the sole or dominant issue. Accordingly, under *Isbrandtsen* and *Riss*, the issue of intent and effect must first be referred to the Commission.

Plaintiffs contend that such action at this time would be premature since plaintiffs have no present intention of proceeding on "the intent and effect" issue so long as the case may be decided on the plaintiffs' theory of the *per se* illegality.

However, the Court is of the opinion that since the Commission has now set for hearing the issues of fact embodied in the Court's order of April 18, 1958, the orderly and expeditious procedure would be to include the issue of intent and effect for consideration and determination by the Commission in a single proceeding.

Accordingly, the defendants' motion to supplement the order of April 18, 1958 will be granted.

Counsel for defendants will submit an order in conformity with the foregoing.

/s/ JOSEPH C. MCGARRAGHY
Judge

February 24, 1959

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

Civil Action No. 875-57

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL.,
Plaintiffs,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL.,
Defendants.

Order

Plaintiffs having moved the Court for an order vacating this Court's prior order of April 18, 1958, defendants having opposed said motion and having moved the Court for an order supplementing this Court's order of April 18, 1958, plaintiffs having opposed said motion and the Court having heard arguments by both plaintiffs and defendants thereon, it is hereby

ORDERED, that the plaintiffs' motion is denied, and it is further

ORDERED, that this Court, while retaining jurisdiction shall withhold decision on the question of violation by defendants of the antitrust laws until the Interstate Commerce Commission has had an opportunity to decide initially what was the intent and effect of the challenged rate practices of defendants, and it is further

ORDERED, that within 10 days of this date a copy of this order be filed with the Interstate Commerce Commission

by one or more of the defendants herein named in the proceeding now pending before the Commission and designated as Docket No. 32415.

/s/ JOSEPH C. McGARRAGHY
Judge

March 2, 1959

APPENDIX "H"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 14,053

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,
Appellants,

v.

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL.,
Appellees.

(Filed Sep. 23, 1959)

Before: Wilbur K. Miller, Bazelon, and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' motion to recall and clarify the mandate of this court, and it appearing that a copy of the opinion and a certified copy of the judgment of this court was transmitted to the District Court on March 14, 1958, 102 U.S. App. D.C. 355, 253 F.2d 877 and that under the provisions of said opinion and judgment the District Court was authorized, *inter alia*, to request the assistance of the Interstate Commerce Commission in determining whether the Commission is empowered by law

to confer antitrust immunity upon the joint agreements of the railroads, and, if so, whether the Commission validly did so in this case; and that the resolution of these issues depends upon the following:

1. Whether or not the railroads' practices under the joint agreements were "rates, fares . . . or charges" within the meaning of § 5(a) of the Interstate Commerce Act, 102 U.S. App. D.C. at 360-61, 253 F. 2d at 882-83; and

2. The extent to which the Commission has power to control, supervise and regulate these rates, 102 U.S. App. D.C. at 361-62, 253 F. 2d at 883-84; and

It appearing that the District Court requested the assistance of the Commission in these matters, it is

ORDERED by the court that the motion to recall and clarify is denied.

Per Curiam.

Dated: September 23, 1959

APPENDIX "I"

Statutory Provisions Involved

Section 5a of the Interstate Commerce Act, added by the Act of June 17, 1948, 62 Stat. 472, and codified as 49 U.S.C. § 5b:

"Sec. 5a. (1) For purposes of this section—

"(A) The term 'carrier' means any common carrier subject to part I, II, or III, or any freight forwarder subject to part IV, of this Act; and

"(B) The term 'antitrust laws' has the meaning assigned to such term in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914.

"(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares,

classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6)) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

"(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

"(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping car companies are carriers of one class; pipe-line companies are carriers of one class; carriers of motor vehicles are

carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

"(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this Act is applicable.

"(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

"(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2), or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

"(8) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

"(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

"(10) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9)."

Section 22 of the Interstate Commerce Act, 24 Stat. 387, as amended by the Act of August 31, 1957, 71 Stat. 564, 49 U.S.C. § 22:

"(1) Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets;

* * *

"(2) All quotations or tenders of rates, fares or charges under paragraph (1) of this section for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, shall be in writing or confirmed in writing and a copy or copies thereof shall be submitted to the Commission by the carrier or carriers offering such tenders or quotations in the manner specified by the Commission and only upon the submittal of such a quotation or tender made pursuant to an agreement approved by the Commission under section 5b of this title shall the provisions of paragraph (9) of said section 5b apply, but said provisions shall continue to apply as to any agreement so approved by the Commission under which any such quotation or tender (a) was made prior to August 31, 1957 or (b) is on or after August 31, 1957 made and for security reasons, as hereinafter provided, is not submitted to the Commission: *Provided*, That nothing in this paragraph shall affect any liability or cause of action which may have accrued prior to August 31, 1957. Submittal of such quotations or tenders to the Commission shall be made concurrently with submittal to the United States Government, or any agency or department thereof, for whose account the quotations or tenders are offered or for whom the proposed services are to be rendered. Such quotations or tenders shall be preserved by the Commission for public inspection. * * *"

Section 5(d) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. § 1004(d):

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial

of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

* * * * * * * *

"(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

FILE COPY

No. 545

Office-Supreme Court, U.S.
FILED
DEC 24 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

ARKOMA TRANSPORT ASSOCIATION, INC., ET AL.,
Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STEPHEN ALES,
1109 Shoreham Bldg.,
Washington 5, D. C.

HUGH B. COX,
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Supreme Court of the United States

OCTOBER TERM, 1959

No. 545

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL.,

Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioners here seek review of a *per curiam* order of the Court of Appeals which in effect refused to review and reverse an unappealable interlocutory order of the District Court. The order of the District Court in turn had referred to the Interstate Commerce Commission for initial consideration certain transportation questions presented in an inter-industry private antitrust action brought by petitioner non-scheduled air carriers against respondent railroads. The petition presents no question appropriate for review by this Court at this intermediate stage of the litigation. It should be denied.

OPINIONS BELOW

The only opinion or decision below which is open to review on this petition for certiorari is the unreported *per curiam* order of the Court of Appeals of September 23, 1959, denying petitioners' motion for recall and clarification of mandate (Pet. App. H, R. 466), motion for clarification or amendment denied, October 20, 1959 (R. 474), petition for rehearing *en banc* denied, November 2, 1959 (R. 500). Prior opinions and orders rendered in the course of this litigation include: District Court, July 5, 1957, 154 F. Supp. 106, J.A. 219-220; Court of Appeals, February 25, 1958, 253 F. 2d 877, Pet. App. A, R. 230; District Court, April 18, 1958, Pet. App. B, R. 300; Interstate Commerce Commission, January 27, 1959, Pet. App. C, R. 448; District Court, February 24 and March 2, 1959, Pet. App. F and G, R. 453 and 463.

JURISDICTION

The *per curiam* order of the Court of Appeals of September 23, 1959 (Pet. App. H, R. 466), motion for clarification or amendment denied, October 20, 1959 (R. 474), petition for rehearing *en banc* denied, November 2, 1959 (R. 500), is properly within the jurisdiction of this Court to review under 28 U.S.C. § 1254(1). No timely petition for certiorari was filed to review the earlier judgment of the Court of Appeals of February 25, 1958 (102 U.S. App. D.C. 355, 253 F.2d 877, Pet. App. A, R. 230), and this decision is accordingly not now reviewable on certiorari.

QUESTION PRESENTED

None of the questions stated in the petition (pp. 3-4) is believed to be properly presented by the Court of Appeals' order of September 23, 1959, now sought

to be reviewed; in fact, respondents submit that no broad or important questions of law or policy are presented for determination in the present procedural posture of this case.

The only question now properly presented to this Court is whether the Court of Appeals abused its discretion in denying petitioners' "Motion for Recall and Clarification of Mandate" and in thereby refusing to review, reverse or modify an unappealable interlocutory order of the District Court. This order of the District Court had withheld decision on a question of violation of the antitrust laws by respondent railroads in engaging in certain alleged concerted rate practices in connection with group military passenger traffic under Section 22 of the Interstate Commerce Act until determination by the Interstate Commerce Commission of the question of the nature, intent and effect of such alleged rate practices and of whether they fell within the scope of approved Section 5a agreements and of the Commission's orders approving such agreements. The District Court had specifically refused to certify its interlocutory order for review under the Interlocutory Appeals Act of 1958, 72 Stat. 1770, 28 U.S.C. §1292(b).

STATUTES INVOLVED

In addition to the statutory provisions quoted in Appendix I to the petition for certiorari (pp. 61-66), reference should be made to the provisions of the National Transportation Policy contained in the Interstate Commerce Act, 54 Stat. 899, 49 U.S.C. preceding §§ 1, 301, 901 and 1001. The full text of this statutory policy is set out in an Appendix to this brief (p. 25).

STATEMENT

In order to give the Court an understanding of the present posture of this litigation and the real nature of the *per curiam* order of the Court of Appeals which is now sought to be reviewed on certiorari, a more connected statement of the case is needed than is contained in the petition.

On April 10, 1957, a number of non-scheduled or supplementary air carriers and their association brought this private antitrust action for injunction and treble damages against most of the leading passenger-carrying railroads in the northeastern and western parts of the United States. The gravamen of the complaint was that the respondent railroads had conspired to injure the competing air carriers by concertedly submitting to the military agencies reduced rates under Section 22 of the Interstate Commerce Act for the transportation of group military traffic. Prior to answer, the respondents moved to dismiss and for summary judgment, contending that whatever concerted rate activities had been engaged in were undertaken pursuant to agreements approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act and were thus relieved from the antitrust laws under the provisions of Section 5a(9) of that Act. The petitioner air carriers filed a cross-motion for summary judgment on the ground that all Section 22 rates to the Government were beyond the coverage of the exemption provided by Section 5a, and that without such exemption the mere fact that such rate quotations were made in concert by otherwise competing railroads made them *per se* violations of the antitrust laws.

The District Court on July 5, 1957, denied the respondents' motions, granted the petitioners' cross-mo-

tion for summary judgment and entered an injunction, holding that "the antitrust immunity conferred by Section 5a of the Interstate Commerce Act does not apply to concerted Section 22 quotations made to the United States Government."[1] The respondent railroads appealed the granting of this injunction to the Court of Appeals for the District of Columbia Circuit. While these appeals were pending, Congress on August 31, 1957, amended Section 22 of the Interstate Commerce Act by adding a subsection which prescribes certain filing procedures for Section 22 quotations made to the Government and which now removes all doubt as to the applicability of the antitrust exemptions of Section 5a to such quotations. See Act of August 31, 1957, 71 Stat. 564, 49 U.S.C. § 22(2), Pet. App. I, p. 65.

In its opinion of February 25, 1958, the Court of Appeals reversed the summary judgment for petitioners which had been granted by the District Court, and held that not all Section 22 rate quotations made prior to the amendment of August 31, 1957, were beyond the coverage of Section 5a of the Interstate Commerce Act. *Atchison, T. & S. F. Railway Co., et al.* v. *Aircoach Transport Association, Inc.*, 102 U.S. App. D.C. 355, 253 F.2d 877, Pet. App. A, p. 31. The court further ruled that the District Court, while retaining jurisdic-

[1] Answers and counterclaims were thereafter filed by the various respondent railroads denying all material allegations of the complaint, including those relating to the nature of the rate practices challenged in the complaint. Respondents also alleged that the petitioner air carriers had themselves violated the antitrust laws to the injury of the respondent railroads by engaging in various illegal concerted bidding activities in connection with group military traffic. These answers and counterclaims, however, were not before the Court of Appeals on the summary judgment appeal.

tion, should withhold decision on the interpretation of Section 5a and of existing agreements approved by the Interstate Commerce Commission under that section until the Commission had an opportunity to decide initially the question of whether the particular rate practices involved here were covered by the statute and by the approved agreements. The Court of Appeals held that the applicability of Section 5a to Section 22 rates might vary depending on the particular type of Section 22 rate activity involved, and this holding brought into issue new questions of transportation law and fact which had not been contemplated by the motions for summary judgment and supporting affidavits then before the court. Those motions had been presented on the opposing legal theories that concerted action in making any Section 22 rates was either entirely within, or entirely outside, the protection of Section 5a.

The court also held, on what it called a separate "aspect of the case", that even if such rate activities were covered by properly approved agreements, they were actionable if they were engaged in for the purpose of destroying the competition of the petitioners, and that this latter question was for trial and determination by the court and need not initially be submitted to the Commission.[2]

In accordance with this decision, the District Court on April 18, 1958, entered an order (Pet. App. B, p. 48) that the court:

> "While retaining jurisdiction, shall, in its discretion, withhold decision on the interpretation of the

[2] Although this Court plainly had jurisdiction to review this decision on a timely petition for certiorari, the judgment of the Court of Appeals was interlocutory only, and no party sought certiorari at that time.

> Interstate Commerce Act and existing agreements approved under section 5a of said Act, insofar as the challenged practices are concerned, until the Interstate Commerce Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be relieved of the operations of the antitrust laws under the statute, and if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date."

This order dealt only with what the Court of Appeals had called the first or so-called *per se* aspect of the petitioners' claim; the other aspect of the case, which depended upon allegations of a purpose to destroy the competition of the petitioners, was continued within the court's jurisdiction without further action at that time.

Promptly thereafter the respondent railroads filed with the Interstate Commerce Commission a petition for the determination of the questions referred by the court, including the complex questions of relevant transportation fact with respect to the nature of the alleged rate practices and the competitive setting in which they had occurred. These were matters with which the Commission had previously dealt in another very similar context, and which were plainly within its area of expertise. See *All American Airways, Inc. v. Abilene & Southern Ry. Co.*, 297 I.C.C. 313 (1955).

Petitioner air carriers thereupon filed with the Commission a Motion to Dismiss and a Petition for Disclaimer of Jurisdiction. In an order dated January 27, 1959 (Pet. App. C, pp. 49, 50), the Interstate Com-

merce Commission ordered a hearing on the respondents' petition,

> "so far as it seeks a determination as to whether the challenged rate practices are, in fact, covered by one or more of the Section 5a agreements which have been previously approved by this Commission and to which the railroad petitioners refer in said petition."

The Commission's order added that

> "said question, involving an interpretation of the scope of agreements which this Commission has approved and a determination of whether the procedures contained in said agreements were adhered to, is appropriate for administrative determination in aid of the Court."

The Commission further disclaimed jurisdiction of the ultimate legal conclusion, which it described as "a question of law which is not dependent upon factors within the special competence of this Commission" and which it stated as "whether the railroad petitioners can, with respect to the challenged rate practices, be relieved of the operations of the antitrust laws under Section 5a(9) of the Interstate Commerce Act."

In the meantime, on August 8 and December 16, 1958, the Court of Appeals for the District of Columbia Circuit had handed down two *per curiam* orders in another antitrust case in which it held that the opinion of this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, had modified that portion of its prior *Aircoach* opinion which had held that the question of whether concerted rate activities had been entered into for the purpose of destroying competition need not be referred to the Interstate Commerce Commission.

The court stated that it was its view "that the Isbrandtsen opinion modifies the holding of the Aircoach case by requiring that the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Sec. 5a of the Interstate Commerce Act must, *in a case where such issue is the sole or dominant issue,* first be referred to the Commission prior to a court determination of whether such rate reduction violates the anti-trust laws." *Atlantic Coast Line RR Co.* v. *Riss & Co., Inc.*, 267 F. 2d 657, 658-59, Pet. App. E, p. 54 (italics supplied).

Following these developments, the District Court in February, 1959, heard a motion by petitioners to vacate the previous order of reference to the Interstate Commerce Commission, on which, as noted above, the Commission on January 27, 1959, had ordered a hearing. At the same time, it heard a cross-motion by respondents to broaden the reference order by including for consideration by the Commission the additional question of the intent and effect of the challenged railroad rate practices. In due course the District Court entered a memorandum opinion of February 24, 1959 (Pet. App. F, p. 55) and an order of March 2, 1959 (Pet. App. G, p. 59), in which it denied the petitioners' and granted the respondents' motion, found that the question of the intent and effect of the alleged practices was "the sole or dominant issue" involved in the petitioners' conspiracy charges, and supplemented its original order of reference to the Interstate Commerce Commission to include this question.[3]

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[3] Upon entry of this order, and pursuant thereto, the respondent railroads promptly amended their petition to the Commission to include this issue. These administrative proceedings have since

Following refusal of District Judge McGarraghy to certify this interlocutory order for appeal under the Interlocutory Appeals Act of 1958, petitioners sought nevertheless to have it reviewed by the Court of Appeals by the device of a "motion for recall and clarification of mandate" and asked in the alternative that this motion be treated as a petition for mandamus or certiorari to the District Court under the All Writs Statute, 62 Stat. 944, 28 U.S.C. § 1651(a). The Court of Appeals heard oral argument on this motion and on September 23, 1959, denied it by a brief *per curiam* order, containing merely a recitation of the status of the proceedings. Following denial on October 20, 1959, of petitioners' further "motion for clarification or amendment" of this order, and denial on November 2, 1959, of their still further petition for rehearing *en banc*, this petition for certiorari was filed.

REASONS FOR DENYING THE WRIT

I

Petitioners argue earnestly that in substance the *per curiam* order of the Court of Appeals of September 23, 1959, was an "amendment" of the court's original decision of February 25, 1958, making that decision in its entirety also now subject to review on certiorari. As the above chronology shows, however, it would be far more accurate to say that in substance this petition for certiorari is no more than an effort to obtain a review in this Court of an unappealable interlocutory order of the District Court, following failure to obtain

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been stalled, however, by successive requests by petitioners for additional time in which to move or otherwise plead to this amended petition, while they have attempted to have the reference order set aside by the Court of Appeals or this Court.

such a review from the Court of Appeals. While in form directed to denial of a motion by the Court of Appeals, it is for all practical purposes the equivalent of a petition for certiorari to the District Court under the All Writs Statute [28 U.S.C. § 1651(a)]. Compare *Atlantic Coast Line R.R. Co.* v. *Riss & Co., Inc.*, October Term, 1959, No. 156 Misc., motion for leave to file petition for certiorari denied, October 12, 1959, 361 U.S. 804.

The only question open for review here is whether the Court of Appeals abused its discretion in refusing under these circumstances to recall, clarify or modify its previous mandate. This is a question of no public importance whatever, and certainly presents no ground for certiorari. The action of the Court of Appeals in refusing to overturn the District Court's interlocutory order of reference to the Commission is not even determinative of the rights of the particular parties to this litigation; all the substantive questions which petitioners want this Court to review and determine now can be much more appropriately decided on a full record, after completion of the pending proceedings. Even the usual objection in primary jurisdiction cases that unreasonable delay will result from reference to the administrative agency is hardly applicable here; the petitioners themselves have stalled the proceedings before the Commission for a year with a multiplicity of motions and petitions in their effort to obtain review of unappealable interlocutory orders of the District Court and to persuade the appellate courts to dispose of the case on legal issues which will not even be ripe for decision until the controlling factual questions have been resolved.

Under these circumstances, respondents respectfully submit that this petition for certiorari should be denied

without further consideration of the merits of the various questions argued. Some of these questions, at least in part, involve issues determined by the opinion of February 24 and order of March 2, 1959, of the District Court, review of which was unsuccessfully sought by petitioners in their motion to the Court of Appeals which was denied on September 23, 1959. Others of petitioners' questions relate only to issues determined by the original decision of the Court of Appeals of February 25, 1958, which determinations have not since been modified or reconsidered. As we shall show in the remainder of this brief, even if these questions are considered now to be properly presented on this petition, no valid grounds have been shown for a writ of certiorari to review them at this intermediate stage of the litigation.

II

The basic question argued to the Court of Appeals by petitioners in their "Motion for Recall and Clarification of Mandate"—and the principal question sought to be raised here—is whether District Judge McGarraghy was wrong in including in his order of March 2, 1959 (Pet. App. G, p. 59) a provision adding to the matters to be considered by the Interstate Commerce Commission the question of the intent and effect of the railroads' challenged rate practices. This issue, it will be recalled, was the controlling question in the second or conspiratorial aspect of the petitioners' claim, in which they alleged that the purpose of the railroads' Section 22 rate quotations was to destroy the petitioners' competition. Admittedly, this action of the District Court was in accordance with the modification of the Court of Appeals' original *Aircoach* opinion which had been specifically made by that court

in *Atlantic Coast Line Railroad Co.* v. *Riss & Co.*, 267 F.2d 657, 658, *supra*, pp. 8-9. The main substantive question sought to be raised in this petition for certiorari, therefore, is whether the question of the intent and effect of alleged concerted Section 22 rate action claimed to have been taken pursuant to agreements approved by the Commission under Section 5a of the Interstate Commerce Act should first be referred to the Commission where such question is the sole or dominant issue in an alleged conspiracy under the Sherman Act.[4]

In *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, this Court held that its earlier decisions in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, did not require delegation to the Maritime Board of the power to decide the ultimate legal question of the validity of dual rate systems employed by a shipping conference; the opinion of this Court stated, however, that these cases recognize that the courts "while retaining the final authority to expound the

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[4] Compare Petitioners' Question 1, p. 3, and discussion pp. 15-18, 25-27. Petitioners' Question 1 studiedly omits the limitation which was imposed by the Court of Appeals in its *Riss* orders and which was found by the District Court to have been satisfied here, that the question of the intent and effect of the challenged practices must be referred only if it is the "sole or dominant" issue of the conspiracy charge. Petitioners also erroneously imply that the practices themselves are not in any way subject to the Commission's regulatory jurisdiction. This is patently not so. Compare, *e.g.*, the discussion of this matter in the opinion of the Court of Appeals of February 25, 1958 (253 F.2d 877, 882-83, Pet. App. A, pp. 37-39), and the standards of the National Transportation Policy incorporated in Section 5a of the Interstate Commerce Act and set out in the Appendix to this brief, p. 25, below.

statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern" (356 U. S. at 498). This Court further stated specifically that in determining whether certain practices constitute "predatory devices",

> "precise findings by the Board as to a particular system's intent and effect would become essential to a judicial determination of the system's validity under the statute" (356 U. S. at 499).[5]

The Court of Appeals in its *Riss* orders applied this reasoning to concerted Section 22 rate reductions claimed to be within the coverage of Section 5a of the Interstate Commerce Act by holding that

> "the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Section 5a of the Interstate Commerce Act, must, in a case where such issue is the sole or dominant issue, first be referred to the Commission prior to a Court determination of whether such rate reduction violates the antitrust laws" (267 F. 2d 658-9, Pet. App. E, p. 54).

Here the District Court specifically found that the issue of the intent and effect of the Section 22 rate practices involved was the "sole or dominant issue" on the conspiracy aspect of the case, and that accordingly this issue should be referred to the Commission. See Memorandum Opinion of February 24, 1959, Pet.

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[5] Accord: *United States* v. *Radio Corporation of America*, 358 U.S. 334, 347-48; *Southwestern Sugar and Molasses Co., Inc.* v. *River Terminals Corp.*, 360 U.S. 411, 420-21.

App. F, p. 58. Not only does this accord with the teaching of the *Isbrandtsen* case, but consideration of Section 5a of the Interstate Commerce Act itself makes it clear that Congress intended to vest in the Interstate Commerce Commission jurisdiction to resolve this very type of conflict between the competing policies underlying the different statutory schemes embodied in the antitrust laws and the Interstate Commerce Act, using as the governing standard the National Transportation Policy.

Petitioners' argument that the Commission is without power to interpret the scope of approved agreements and of its own orders approving them under Section 5a; or that it cannot properly marshal the relevant transportation facts and apply such agreements and approvals to them in the light of the controlling standards of the National Transportation Policy, is utterly inconsistent with the basic purposes as well as the specific provisions of these important statutory provisions. It also disregards plainly applicable principles laid down in decisions of this Court in closely comparable situations. Compare *United States v. Western Pacific R.R. Co.*, 352 U. S. 59; *Service Storage and Transfer Co., Inc. v. Virginia*, 359 U. S. 171, 179.

Section 5a(2) vests in the Commission alone the power to approve agreements, upon such terms and conditions as it deems necessary, which it finds "by reason of furtherance of the national transportation policy" should be relieved from the operation of the antitrust laws. The National Transportation Policy, the full text of which is set out in an Appendix to this brief (p. 25), is stated in the Act to be directed "to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, *as well as by other means*, adequate to meet the

needs of the commerce of the United States, of the Postal Service and of the National Defense." Among the practices which the Commission is enjoined to encourage are the establishment of reasonable charges for transportation services without "unfair or destructive competitive practices".

The clear intention of Congress was thus to vest the task of reconciling competing statutory policies in the Commission and to give it continuing supervisory authority over the agreements it approves and their effect and impact in practical operation. Compare *Minneapolis & St. Louis Ry. Co.* v. *United States*, December 14, 1959, slip op. pp. 11-13. Particularly is this true in a situation involving an inter-industry controversy over competitive transportation services. As the House Committee on Interstate and Foreign Commerce stated in its report on the Reed-Bulwinkle bill which became Section 5a (H.R. Rep. 1100, 80th Cong., 1st Sess., 1947, p. 5):

> "It is obvious that confusion and uncertainty are inevitable where these two principles of public policy [the antitrust laws and the National Transportation Policy], administered and enforced by different agencies, are applied in such a way that there is conflict between them. It is equally obvious that Congress cannot itself, by legislation, deal with each instance of joint action by carriers to resolve whatever conflict may exist between the principles of the antitrust laws and the national transportation policy.
>
> "The only practical approach to the problem is to grant to a competent administrative agency, as is proposed in the bill, the authority to resolve the conflict in specific instances of proposed joint action by the carriers.

> "Since this problem arises in the relatively circumscribed field of transportation, the agency which is particularly well qualified to exercise this authority is the Interstate Commerce Commission. The bill here reported, therefore, places this responsibility upon that Commission."

Under these circumstances it seems plain that, at least where as here the intent and effect of rate activities claimed to be covered by approved Section 5a agreements is the sole or dominant issue in an alleged antitrust conspiracy, it is not only proper but essential that the matter be referred to the Interstate Commerce Commission for appropriate initial consideration.[6] This is what the District Court's order of March 2, 1959 did, and the matter is now properly pending before the Commission.

III

Another question unsuccessfully urged by the petitioners to the District Court and subsequently to the Court of Appeals, and now sought to be submitted to this Court, concerns the petitioners' alternative claim that the railroads' Section 22 rate quotations to the military authorities constituted *per se* violations of the

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[6] Respondents believe that both the plain provisions of Section 5a(7) of the Interstate Commerce Act and a consideration of its legislative history as a whole indicate that this provision provides an additional basis for Commission jurisdiction to determine the questions which are now pending before it. In this respect respondents respectfully submit that the Court of Appeals was wrong in its analysis of this provision in its decision of February 25, 1958, on the summary judgment appeal. See 253 F.2d at 884-85, Pet. App. A, pp. 41-42. This question, however, is not one which calls for review by this Court on the present record.

Sherman Act, regardless of their intent or effect, and were not exempt by Section 5a. Petitioners argue that the issue of whether or not these alleged rate practices fall within the scope of agreements approved by the Commission under Section 5a should have been withdrawn from the Commission, even though it had been set down for hearing by the Commission's order of January 27, 1959 (Pet. App. C, pp. 49-51); they urge that the inclusion in this same order of the Commission's disclaimer of jurisdiction over the ultimate legal question of the nature of the exemption included in Section 5a(9) required that this matter forthwith be passed upon by the court without awaiting determination of the questions which the Commission had set for hearing. Petitioners rely on *Southwestern Sugar & Molasses Co., Inc.*, v. *River Terminals Corp.*, 360 U.S. 411, 414-15, for the proposition that the reference of an issue to an administrative agency should not be made if the case can be disposed of by an alternatively available determination of law which is "ripe for decision".[7]

The difficulty with this argument is that the question of law which petitioners have asked the courts to decide without awaiting action by the Interstate Commerce Commission is not, as it was in *River Terminals*, an alternative ground "ripe for decision" on which the case can be disposed of. While the petitioners' argument with respect to this question of law has not been

[7] See Question 4, Pet. p. 3, and discussion pp. 23-25. Petitioners apparently also urge that the original decision of the Court of Appeals of February 25, 1958, was in error in ordering *any* reference to the Commission and should also now be reviewed and reversed, even though this aspect of that decision has not since been reconsidered or modified in any way by the Court of Appeals, and no timely petition for certiorari to review that decision was filed. See Question 3, Pet. p. 3, and discussion pp. 18-22.

fully articulated in the petition, the grounds on which petitioners urged both courts below to withdraw the matter from the Commission and summarily dispose of the case were that the rate practices as alleged in the complaint did not constitute "rates, fares, . . . or charges" as those terms are used in Section 5a(2), that such practices as a matter of law were therefore beyond the statutory reach of Section 5a, and that the court should accordingly on this basis reinstate the original summary judgment for the petitioners without awaiting any determination by the Interstate Commerce Commission.

This contention was properly rejected below. In the first place, the question sought to be decided forthwith by the court quite plainly involves a technical transportation question under Section 5a(2) of the Interstate Commerce Act, and one which is quite different from the ultimate 5a(9) question which the Commission disclaimed. Even more important, petitioners' contention is grounded on the fallacious premise that only a question of law is presented and that no issues of fact with respect to the alleged rate practices remain to be decided. As the District Court itself stated in its opinion of February 24, 1959, however, denying petitioners' motion to withdraw the reference to the Commission, the latter was actually "proceeding to a hearing on the *issues of fact* stated in the order" (Pet. App. F, p. 55) (italics supplied).[*] These issues of fact are

[*] The District Court further emphasized this aspect of the hearing ordered by the Commission by stating:

> ". . . the Court is of the opinion that since the Commission has now set for hearing the issues of fact embodied in the Court's order of April 18, 1958, the orderly and expeditious procedure would be to include the issue of intent and effect for consideration and determination by the Commission in a single proceeding" (Pet. App. F, p. 58).

substantial. It is plainly not possible to determine whether certain rate practices were "rates, fares, . . . or charges" or properly fell within the scope of agreements approved by the Commission until there has been a factual determination of what those rate practices were and the competitive setting in which they occurred.[9] All of these things in turn must be determined before there can be a decision on the ultimate legal question of the effectiveness of the exemption—the only question of law which the Commission has disclaimed. This reads precisely on what this Court said in *Isbrandtsen*, that in situations of this sort the courts "while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern" (356 U.S. at 498).[10]

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[9] Petitioners have urged repeatedly to the District Court and to the Court of Appeals that in spite of the fact that the allegations of the complaint with respect to the nature and effect of these rate practices have been denied in the respondents' answers, there are no disputed issues of fact. They have relied for this position on a reference in the Court of Appeals' opinion of February 25, 1958 (253 F. 2d at 879, Pet. App. A, p. 32) to what it called "the essential undisputed facts"—a statement obviously made only for purposes of that summary judgment appeal. *Cf. Griffin* v. *Griffin*, 327 U.S. 220, 234-35; *Helms* v. *Duckworth*, 101 U.S. App. D.C. 390, 396, 249 F. 2d 482, 488, (1957). Neither court below accepted the petitioners' argument. It plainly presents no question appropriate for consideration by this Court.

[10] In *United States* v. *Radio Corporation of America*, 358 U.S. 334, 348, this same principle was approvingly described as "the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action." See also *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 420-21.

The courts below have properly stayed their hand until completion of the proceedings already pending before the Commission.

IV

Petitioners have not been content with arguing here merely the questions presented by the District Court's interlocutory order of March 2, 1959, which was the only real basis for their "Motion for Recall and Clarification of Mandate" in the court below. They have also attempted to raise the principal question presented to and decided against them by the Court of Appeals in the two-year-old summary judgment appeal of February 25, 1958. This is the question of whether, as they contend, *all* Section 22 rates to the Government were intended by Congress to be excluded from the coverage of Section 5a of the Interstate Commerce Act.[11] The original holding of the Court of Appeals that at least some Section 22 rates fall within the coverage of Section 5a has not been modified or even reconsidered by any of the courts below since that decision.

Respondents believe that the extensive legislative history of the Reed-Bulwinkle Act of 1948—the original Section 5a—makes clear that petitioners' contention is without merit.[12] For purposes of this petition for certiorari, however, it should suffice to point out that the amendment to Section 5a of August 31, 1957, 71 Stat. 564, 49 U.S.C. § 22(2) (Pet. App. I, p. 65), has eliminated this question with respect to Section 22 quotations made after that date, and so has deprived it of any

[11] Question 2, Pet. p. 3, and discussion pp. 22-23.

[12] A summary of legislative history references is contained in footnote 11 to the opinion of the Court of Appeals on the summary judgment appeal of February 25, 1958, 253 F. 2d at 881 (Pet. App. A, p. 36).

importance worthy of certiorari. Congress quickly enacted this amendment to rectify for the future the anomalous result of the original District Court decision of July 5, 1957, which granted a summary judgment to the petitioners in this case (later reversed). The specific provision of this amendment that the antitrust exemptions of Section 5a "shall continue to apply" to Section 22 quotations,[13] together with its legislative history,[14] provide further confirmation that Congress originally intended to include Section 22 quotations within the coverage of Section 5a. In any event, however, the enactment of the 1957 amendment certainly eliminated any importance that the question might have beyond this particular litigation.

CONCLUSION

Throughout the petition an attempt is made to emphasize that there is somehow "an unresolved three-way division" among the judges below (p. 16), and

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[13] 71 Stat. 564, 49 U.S.C. § 22(2), Pet. App. I, p. 65.

[14] See, *e.g.*, statement accompanying Conference Report on this amendment (H.R. Rep. 1171, 85th Cong., 1st Sess., 1957, p. 5):

> "This decision was most unexpected, as it had been assumed by the carriers since the enactment of the Reed-Bulwinkle amendment [Section 5a] in 1948 that it applied to section 22 rates in the same manner that it applies to other rates. Furthermore, it is the opinion of those Members of the House who were serving on the House Committee on Interstate and Foreign Commerce at the time the Reed-Bulwinkle amendment was passed that the intention of Congress at the time was in accord with the view taken by the rail carriers. . . . .
>
> "Therefore, the language which the House added to the proposed paragraph (2) of section 22 was intended to make it clear that the Reed-Bulwinkle amendment applies in the case of section 22 rates."

numerous conflicts with decisions of this Court and other federal courts. A picture of utter confusion in the courts below is drawn, with the District Judge in this (*Aircoach*) case said to be following the Court of Appeals' decision in *Riss*, and the District Judge in *Riss* following the Court of Appeals' decision in *Aircoach* (p. 28). All of this is fallacious. There is no conflict among the panels of the court below; in fact, two of the three judges of the unanimous panel below were also members of the unanimous *Riss* panel.[15] Similarly, the finding subsequently made by District Judge Sirica in the *Riss* case was specifically that the question of the intent and effect of the challenged rate practices there was "not the sole or dominant issue of the case" (170 F. Supp. 354, 366), while, as noted above (p. 14), District Judge McGarraghy made precisely the opposite finding here. See opinion of February 24, 1959, Pet App. F, pp. 55, 58.

What does emerge from this petition, however, is that petitioners have now exhausted every device within the ken of imaginative counsel in an effort to find a shortcut method of somehow obtaining a favorable judgment in this case without a trial on the merits, and above all without any kind of hearing before the one body specially qualified by experience and designated by Congress to deal with these highly specialized

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[15] The panel below which denied petitioners' motion for recall and clarification of mandate consisted of Circuit Judges Miller, Bazelon and Burger. In accordance with usual practice in the District of Columbia Circuit, this was the same panel which had decided the original summary judgment appeal in this case on February 25, 1958, but Judge Burger had been substituted for Judge Fahy when the latter disqualified himself.

The panel which decided the *Riss* orders (267 F. 2d 657, 658) consisted of Circuit Judges Bazelon, Bastian and Burger.

transportation problems—the Interstate Commerce Commission.

The present posture of this case is that the facts with respect to the railroads' "challenged rate practices" are now at issue, that the Interstate Commerce Commission is the tribunal which must marshal these transportation facts to provide the basis for judicial action, and that the Commission is similarly the body which must interpret the scope of the applicable Section 5a agreements and its approvals thereof in the light of such facts and of the requirements of the statute. Such a proceeding for these very purposes is now pending before the Commission, and is being stalled only by the pendency of this petition.

The petition for certiorari should be denied.

Respectfully submitted,

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DECEMBER 24, 1959

APPENDIX

The National Transportation Policy, Act of Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, codified under Title 49 U.S.C., preceding §§ 1, 301, 901 and 1001:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 545

AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL.,
Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILROAD CO., ET AL.,
Respondents.

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

INTRODUCTORY STATEMENT

A Court of Appeals renders a judgment deciding legal questions of substance in a litigant's favor and directs the district court to take further action in accordance with its mandate (Pet. App. A). In a subsequent case between different parties another panel of that Court modifies the holding in the first case (Pet. App. D). The district court then refuses to follow the mandate in the first case; instead, it specifically follows the holding in the second case (Pet. App. F, pp. 57-58). Thereafter, the Court of Appeals denies the litigant's motion for recall and clarification of the mandate or alternative relief in the nature of mandamus (Pet. App. H), leaving the district court's order (Pet.

App. G) unchanged. Has the Court of Appeals thereby worked a revision or amendment of its original judgment so as to subject the original judgment, as thus amended, to the certiorari jurisdiction of this Court? We think this question must be answered "YES." Otherwise, the litigant would be deprived of his opportunity to invoke this Court's certiorari jurisdiction. Since the original determination was favorable to him, he *would* not seek review. And because the subsequent adverse determination was made in a case in which he was not a party, he *could* not obtain review.

Having successfully argued in the court below that the plain and unambiguous effect of the Court of Appeals' order of September 23, 1959 was to work a substantial revision of the prior opinion and judgment (see Pet. 13, fn. 7), respondents now urge that "it would be far more accurate to say" that the Court of Appeals' order did no more than deny review of an unappealable interlocutory order of the district court (Res. Br., 10-11). Plainly, respondents' about-face is an attempt to avoid a consideration by this Court of Questions 2 and 3 of the Questions Presented.[1] For the reasons set forth in the Petition for Certiorari, pp. 11-14, we submit that a petition for a writ of certiorari to review the prior judgment (Pet. App. A) as amended September 23, 1959 (Pet. App. H), is one which is "timely filed."

[1] Obviously respondents were compelled to take this position because (1) the Court of Appeals decided Question 2 in a way in direct conflict with this Court's recent decisions in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 and *United States* v. *Radio Corporation of America*, 358 U.S. 334 [both decided subsequent to the original determination below] (Pet. 22-23), and (2) this Court recently granted certiorari to review the procedural question presented by *Pennsylvania R. Co.* v. *United States*, No. 151, October Term, 1959, thereby emphasizing the fundamental importance of Question 3 which includes, among other things, the same problem (Pet. 20-22).

Respondents also attempt to create nonexistent fact issues in order to persuade the Court that the legal questions presented are not ripe for determination. The court below held all these relevant material facts to be undisputed (Pet. App. A, pp. 32-33). And in its present procedural posture this case is no more or less final and at no more or less an intermediate stage than were *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, and *Davidson Transfer & Storage Co.* v. *United States*, *ibid.*, when certiorari was granted in those cases. Certainly, it is more final and at less an intermediate stage than was *Southwestern Sugar & Molasses Co.* v. *River Terminals Co.*, 360 U.S. 411, when certiorari was granted in that case.

But respondents strenuously urge that the Court of Appeals' September 23, 1959 order was not a substantial amendment of the original judgment entered February 25, 1958 (Res. Br., 10-11). Assuming, without conceding, the correctness of respondents' view, we will nevertheless show that there are "special and important" reasons why this Court should grant certiorari to review Questions 1, 4 and 5 of the Questions Presented *at this time*.

I

Respondents urge that Question 1 of the Questions Presented (Pet., 15-18) should not be reviewed by the Court at this time because where "the intent and effect of rate activities claimed to be covered by approved section 5a agreements is the sole or dominant issue in an alleged antitrust conspiracy, it is not only proper but essential that the matter be referred to the Interstate Commerce Commission for appropriate initial consideration" (Res. Br., 17). In support of this position respondents argue (1) that in the light of this Court's holding in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, the ICC must first marshal the relevant transportation

facts (Res. Br. 13-15), and (2) that Congress, by enacting the National Transportation Policy, vested the ICC with the power to resolve inter-industry controversies over competitive transportation services (Res. Br., 15-16). The misapplication of this Court's holding in *Isbrandtsen* is discussed in the Petition for Certiorari, pp. 15-18, and need not be repeated here. Respondents' misplaced reliance on the National Transportation Policy is easily demonstrated.

Respondents argue that in enacting the Reed-Bulwinkle Act Congress was faced with the problem of reconciling the principles embodied in the antitrust laws with the principles embodied in the National Transportation Policy (Res. Br., 16-17). This is correct. But an argument that Congress reconciled these principles in the case of section 22 rates by directing that both be ignored is little short of ludicrous. Apart from the reasons set forth at page 17 of the Petition for Certiorari, the National Transportation Policy has no application to section 22 rates because the ICC has no regulatory jurisdiction. *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 543 ftn. 10, 547. Yet, respondents urge that the antitrust laws do not apply because of their asserted 5a immunity. Such a contention requires the Court to assume, with no basis in the legislative history, that Congress intended an entirely irrational result—that of creating a "no man's land" in which neither of these important policies was to be operative. Furthermore, it is apparent on its face that the National Transportation Policy has no application in the case of rail-air carrier competition. Dearing and Owen, *National Transportation Policy*, 171-184 (1949). The authors there point out:

> "So far as declared policy is concerned, we . . . . have a head-on conflict between the Interstate Commerce Act and the Civil Aeronautics Act. One program considers the railroads, highways, domestic waterways, and pipelines as fit subjects for unified treatment. The competitive price and service practices

> of these agencies are to be made responsive to high standards of performance, encompassing nondiscriminatory treatment of public patrons and economic standards of interagency competition. Moreover, the Interstate Commerce Act embodies the explicit proposition that these agencies should somehow be welded into an integrated and efficiently functioning national transportation system. In sharp contrast, the other line of government action assumes that the movement of goods and people by air carriers produces economic, social, and national security values which are superior to, or at least different from, the values produced by other forms of transportation in the performance of identical services." *Id.*, at pp. 180-181.

Assuming, *arguendo*, that the Court of Appeals' September 23, 1959 order (Pet. App. H) was not a substantial amendment of the original determination below (Pet. App. A), this Court should nevertheless grant certiorari to review Question 1 *at this time*. See *United States Alkali Export Association* v. *United States*, 325 U.S. 196, 203-204.

II

Respondents contend that Question 4 of the Questions Presented (Pet. 23-25) should not be reviewed by the Court at this time because a full factual determination by the ICC as to what respondents' "rate practices were and the competitive setting in which they occurred" is a prerequisite before the courts can determine whether agreements encompassing such practices may legally be approved by the ICC under section 5a(2) of the Interstate Commerce Act (Res. Br., 17-21). Underlying this argument is the assertion that the courts below, in accordance with *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, were properly availing themselves "of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Id.*, at p. 498. Since, however, the facts essential to a determination of the question of "coverage

by statute" are "undisputed," respondents' argument that it "is plainly not possible to determine whether certain rate practices were 'rates, fares . . . or charges' * * * until there has been a factual determination of what those rate practices were and the competitive setting in which they occurred" (Res. Br., 20) is self-defeating. The "aid implicit in the agency's superiority in gathering the relevant facts and marshaling them into a meaningful pattern," *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498, is not needed here because all the relevant undisputed facts have already been gathered and marshaled into a meaningful pattern both by the Court of Appeals in its original determination (Pet. App. A, pp. 32-33, 45-47)[2]

[2] The Court of Appeals found the "essential undisputed facts" with respect to these practices as follows: (1) Variable spot bids—Joint agent bids at variable rates within an established range as low as 50% below regular tariffs. The agent acts for both competing and connecting roads (Pet. App. A, pp. 32, 45); (2) Package bids—Single fixed bids for movements from one starting point to a number of different destinations. Such bids are submitted on an all-or-nothing basis. The air carriers are unable to participate in portions of these movements because of the short distance, lack of airfields, or numerical size of some segments. Package bids are accompanied by a condition that the Government must give certain specified traffic to the railroads which otherwise might go to the airlines (Pet. App. A, pp. 32, 45-46); (3) "The practices constitute a system of price-fixing in concert by competing, nonconnecting carriers. We are unable in law to distinguish such concerted fixing of charges and conditions for transportation from price-fixing of commodities, * * * and we emphasize that the practices enjoined are not those of connecting carriers for through transportation, but those which result from concert between competing and nonconnecting carriers. These carriers agree among themselves, through their joint agent, on a charge within a certain range" (Pet. App. A, pp. 44-45); (4) "If the quantity of traffic were material, we think there could be no doubt that it is so substantial, and the railroad's control of it so great, that the antitrust decisions referred to have application" (Pet. App. A, p. 46, fn. 25); and to leave no doubt as to what was found on the record, and what was still

and by the ICC in *All American Airways, Inc.* v. *Abilene & Southern Ry. Co.*, 297 ICC 313, 316-318 (1955). Cf. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 69.

Where a case is remanded by an appellate court for further proceedings "not inconsistent with its opinion" the "opinion" is a part of the mandate and every question of fact or law before that court and decided by its opinion is conclusively settled for the lower court in all further proceedings in the litigation. *N.A.A.C.P.* v. *Alabama*, 360 U.S. 240, 244-245; *Gaines* v. *Caldwell*, 148 U. . 228, 239-241. This rule is in no way altered where, in reversing an order granting a motion for summary judgment, a particular issue is raised and argued in the appellate court and is passed upon. *F.A.R. Liquidating Corp.* v. *Brownell* (3 Cir.), 223 F. 2d 128.[3] Thus, when respondents argue that

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open to dispute on remand to the district court, the Court of Appeals stated:

> "In the District Court allegations and verified statements were made on behalf of Aircoach to the effect that the practices enjoined were in purpose employed by Railroads to eliminate the competition of Aircoach. Notwithstanding this, both Aircoach and Railroads moved for summary judgment. In the circumstances we construe each motion as a claim by the movant that it was entitled to judgment as matter of law on those facts which were undisputed. The motion of Railroads is not to be construed as admitting factual allegations in regard to a purpose to destroy competition which would have the legal result of removing Railroads from any possible protection from the anti-trust laws; nor can Aircoach's motion be construed as abandoning those allegations. *Thus, on this aspect of the case, there remains a factual dispute.*" (Pet. App. A, pp. 46-47, emphasis supplied.)

[3] Similarly, where an issue is raised and argued in the appellate court and is passed upon, a defendant cannot again raise that issue in his answer, even where it was never pleaded as a defense. *H. P. Coffee Co.* v. *Reid, Murdoch & Co.* (8 Cir.), 60 F. 2d 387, 389; *In re N. V., etc. of Rotterdam* (5 Cir.), 64 F. 2d 915, 916; *Mortgage Loan Co.* v. *Livingston* (8 Cir.), 66 F. 2d 636, 638-640, cert. den. 290 U.S. 685; *Britton* v. *Dowell* (10 Cir.), 243 F. 2d 434.

the Court of Appeals' holding (*i.e.*, that the applicability of section 5a to section 22 rates might vary depending upon the particular type of section 22 rate activity involved) "brought into issue new questions of transportation law and fact which had not been contemplated by the motion for summary judgment and supporting affidavits then before the court" (Res. Br. 6), this assertion is belied by their own words. For, in answer to petitioners' argument below that, even if concerted action in making *uniform* section 22 rates (*e.g.*, first class fare less 10%) was validly immunized, respondents' "'variable' section 22 quotation and 'package' bidding practices were *per se* illegal, or were otherwise in violation of the antitrust laws on the basis of the undisputed facts of record,"[4] respondents stated:

> * * * every aspect of defendants' rate practices now singled out for attack by plaintiffs (the variable rates, the so-called 'range' within which the rates were made, and the so-called package rates) were all the subject of attack before the Commission in the *All American Airways* proceeding brought under Section 5a(7). The Commission expressly recognized that in reciting the issues before it (297 I.C.C. at 316): 'The railroads, through the chairman of their respective passenger associations or committees, make a bid or response to every cost request submitted by the military, either by offering the standard 10-percent discount provided by JMPA, or, since late in 1953, for 18 or more military personnel traveling in a group, with special trains provided for 190 or more, by making a *special bid*, as low as *2.3* cents per passenger-mile in the West and *2.1* in the East, *sometimes on a package basis* for movements with a common date and origin and reflecting *in some instances* a discount of as much as 50 percent under the commercial fares." (Emphasis supplied.) We may properly add that plaintiffs could in no event deprive the defendants of a full trial on questions of purpose, reasonableness of defendants' practices in the light of all the circumstances, and the

[4] Appellees' Supplemental Memorandum filed with the Court of Appeals on January 13, 1958, pp. 15-22.

nature of plaintiffs' competition which defendants were meeting in good faith—even assuming, contrary to our position here, that such issues are justiciable in this proceeding without prior resort to the Commission * * * In addition it should be noted that defendants made the following showing in the proceeding before the Commission in the *All American Airways* case (and would be prepared to make such a showing in any further trial of these matters): that the variable rates are requested by the Department of Defense in response to cost requests covering individual movements of military personnel and are necessary if defendants are to compete with plaintiffs for this traffic; that the 'range' setting a floor below which special Section 22 rates will not be made is a practice which benefits and cannot injure plaintiffs since such a floor guards against rates made below the cost of service; and that the practices of package bidding was instituted by the non-scheduled airlines themselves and is, in any event, essential in providing special train services in response to cost requests covering volume movements. See, e.g., 297 ICC at 318 and some portions of the testimony before the Commission at J.A. 118-171. The *All American Airways* case shows that the validity of these rate practices can be and in fact has been litigated before the Commission."[5]

The foregoing demonstrates what respondents represented to the Court of Appeals as being the only issues of fact remaining in this case and the court decided it on that basis. Respondents had a full opportunity, of which they took every advantage, to show by affidavit and other pleadings the issues which were raised, and at no point prior to the Court of Appeals' original decision did they assert that they had not engaged in these practices or dispute petitioners' claims regarding their nature.[6] In fact, the

[5] Reply Memorandum for Appellants filed with the Court of Appeals on January 16, 1958, pp. 6-8.

[6] Respondents' assertion that the Court of Appeals' explicit findings as to the precise nature of the challenged rate practices was a statement obviously made only for the purposes of that sum-

Court of Appeals acted upon a record in which both sides gave non-conflicting descriptions of the variable "spot" and "package" bidding practices at issue here. Compare J.A. 42-48 with J.A. 86-89, J.A. 118-150 and J.A. 169-170. Respondents did raise questions of fact as to their motive or intent, whether the practices resulted in below-cost quotations, and whether petitioners' damages were caused by respondents or by some independent causation. But as to the nature of the practices themselves—there was no dispute. Nor could there have been, for these very practices had been the subject of extensive testimony and documentation in *All American Airways, Inc.* v. *Abilene & Southern Ry. Co.*, 297 ICC 313 (1955), and the record and findings in that proceeding were the factual base relied on by both sides in the litigation. Respondents have raised these alleged fact issues solely to create the erroneous impression that this case is not ripe for determination at this time. The attempt comes much too late. In *N.A.A.C.P.* v. *Alabama*, 360 U.S. 240, this Court recently had occasion to reiterate the familiar rule that whatever was before the appellate court, and was disposed of, is considered as finally settled. *Id.*, at pp. 244-245.[7]

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mary judgment appeal" (Res. Br., 20 ftn. 9) is patently spurious. *F.A.R. Liquidating Corp.* v. *Brownell* (D.C., Del.), 130 F. Supp. 691, 694-695, motion to recall mandate denied (3 Cir.), 223 F. 2d 128. Moreover, as their own memorandum of January 16, 1958 in the court below quite clearly shows, both *Griffin* v. *Griffin*, 327 U.S. 220 and *Helms* v. *Duckworth* (C.A.D.C.), 249 F. 2d 482 are inapposite. Furthermore, if in fact the Court of Appeals rejected our argument as respondents now urge, how can they argue in the very same brief that the Court of Appeals' order of September 23, 1959 (Pet. App. H) was not a substantial amendment of the original opinion and judgment (Pet. App. A)?

[7] Respondents lean heavily on a reference in the district court's opinion (Pet. App. F) to the *issues of fact* stated in the ICC's order (Res. Br., 19). As shown from the ICC's order itself, these issues are (1) "whether the challenged rate practices are, in fact, covered by one or more of the section 5a agreements which have been previously approved by [the ICC]," and (2) "a determina-

Nevertheless, respondents assert that the question which petitioners sought to have decided forthwith by the courts below "quite plainly involves a technical transportation question under section 5a(2) of the Interstate Commerce Act and one which is quite different from the ultimate 5a(9) question which the Commission disclaimed" (Res. Br., 19). First of all, the ICC's order makes it clear that it was disclaiming the precise legal question set forth in the Court of Appeals' opinion (Pet. App. C, p. 50), so an argument that the ICC intended to vary the nature of that question is spurious. Secondly, since the facts on the first branch of this case are no longer open to dispute, an ICC determination "in aid of the Court" (Pet. App. C, p. 51), would have to be made on the undisputed facts, and not on some new ones which respondents might think up. Nor can respondents be serious when they urge that "the question sought to be decided forthwith by the Court plainly involves a technical transportation question under section 5a(2) of the Interstate Commerce Act." In the words of Mr. Justice Brandeis, "[h]ere no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the [statute] which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary." *Great Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U.S. 285, 294.

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tion of whether the procedures contained in said agreements were adhered to * * * " (Pet. App. C, p. 50). The first is a fact question the ICC can decide merely by examining the 5a agreements in its files; it involves no expertise whatever. The second was conceded by petitioners in the court below and is no longer in the case.

For the reasons set forth at pp. 23-25 of the Petition for Certiorari the refusal of the courts below to determine whether, in view of the undisputed facts, agreements encompassing respondents' challenged rate practices may legally be approved by the ICC under section 5a(2) of the Interstate Commerce Act, was in direct violation of this Court's holdings in *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 414-415, and *United States v. Radio Corporation of America*, 358 U.S. 334. Moreover, in the light of this Court's action of December 14, 1959, granting certiorari in *Pennsylvania R. Co. v. United States*, No. 451, October Term, 1959, review at this time becomes essential. If the petitioner in that case is successful in sustaining its position before this Court and certiorari is denied on Question 4 of the Questions Presented in this case, an advisory determination by the ICC (Pet. App. H) in aid of the district court's jurisdiction under the antitrust laws (Pet. App. C, p. 51) will be converted into a conclusive determination depriving the district court of any effective antitrust jurisdiction, including its power under the mandate of the court below to "*proceed according to its own light* to interpret * * * the agreements" (Pet. App. A, p. 44; emphasis supplied).

III

Assuming, *arguendo*, that the Court of Appeals' September 23, 1959 order (Pet. App. H) was not an amendment or revision of the original judgment entered February 25, 1958 (Pet. App. A), it is immediately apparent that the Court of Appeals has so far sanctioned a departure by the district court from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision. The September 23, 1959 order below (Pet. App. H) sanctioned a departure by the district court from the long settled "strict mandate" rule and a consequent breakdown in orderly

judicial administration.[5] The district court's order of March 2, 1959 (Pet. App. G) was no mere technical violation of the Court of Appeals' mandate. It referred to the ICC issues which the Court of Appeals said should not be referred, and having expanded the reference, it then refused to decide a question of law which would have completely disposed of the litigation.

Petitioners did not seek certiorari from the original determination (Pet. App. A) because, on the whole, that decision was favorable to them. Yet, after their time to petition for certiorari from that determination had expired, another panel of that court in *Atlantic Coast Line R. Co. v. Riss & Co. Inc.* (C.A.D.C.), 267 F. 2d 657 held that one of the most favorable portions of the original holding had been adversely "modified" against them. Petitioners could not seek certiorari from the "modifying" decision in *Riss* because they were not parties to it. *In re Leaf Tobacco Board, etc.*, 222 U.S. 578. Thus, by permitting the district court's order of March 2, 1959 to stand, the Court of Appeals effectively deprived petitioners of an opportunity to seek review from this Court through the simple device of "modifying" the original holding in a case in which petitioners were not parties. In these circumstances, the action of the court below was inconsistent with basic fairness and a violation of "due process". It obliterated petitioners' right to invoke the certiorari jurisdiction of this Court. To say that the result did not comport with orderly judicial administration is, in our

[5] In *Gaines v. Caldwell*, 148 U.S. 228, this Court held that, although a subsequent decision might have caused a different result, it could not "on well established rules and principles permit the circuit court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present [case]." *Id.*, at p. 244. This has always been the law. *In re Potts*, 166 U.S. 263, 267-268; *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 91; *National Brake Co. v. Christensen*, 254 U.S. 425, 430-431; *Southard v. Russell*, 16 How. 547, 570-571.

view, an understatement. Cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580; *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U.S. 464, 476; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678, 681.

Respondents impliedly concede that the action of the Court of Appeals was an abuse of discretion (Res. Br., 11). Nevertheless, they urge that the instant petition is the practical equivalent of a petition for certiorari to the district court under 28 U.S.C. § 1651(a) (Res. Br., 10-11).[9] In *United States* v. *United States District Court*, 334 U.S. 258, the government petitioned for a writ of certiorari to review a denial of mandamus by the Court of Appeals. At the same time, it petitioned this Court for leave to file a petition for mandamus under the All Writs Statute. The writ of certiorari was granted. The petition for

[9] The district court's order of March 2, 1959 (Pet. App. 6) was an interlocutory one. It was also in direct violation of the Court of Appeals' mandate. And respondents are correct when they state that petitioners sought "to have it reviewed by the Court of Appeals by the device of a 'motion for recall and clarification of mandate' and asked in the alternative that this motion be treated as a petition for mandamus or certiorari to the District Court under the All Writs Statute. 62 Stat. 944, 28 U.S.C. § 1651 (a)" (Res. Br., 10). Historically, mandamus has always been available to control an interlocutory order of a lower federal court whenever it has refused to give effect to or has misconstrued the appellate court's mandate. *B. & O. R. Co.* v. *United States*, 279 U.S. 781, 785; Vol. 6, *Moore's Federal Practice* [2d Ed.], p. 70. And since 1948, a motion to recall and clarify the mandate has been used to accomplish a similar result where supervening events indicate that amendment of the mandate rather than mandamus is the more appropriate remedy. See, *e.g.*, the sharply parallel case of *Bernstein* v. *N.V. Nederlandsche, etc.* (D.C., SDNY), 117 F. Supp. 898, 902-903, mandamus den., *sub. nom. Chemical Bank & Trust Co.* v. *Dimock* (2 Cir.), 210 F. 2d 376, mandate amended, *Bernstein* v. *N. V. Nederlandsche, etc.* (2 Cir.), 210 F. 2d 375, in which the Court of Appeals, confronted simultaneously with a motion to recall its mandate and a petition for mandamus, chose to recall its mandate.

mandamus was "held" pending decision on certiorari and, after a decision reversing the Court of Appeals, this Court denied the motion for leave to file the petition for mandamus. See *United States* v. *United States District Court*, 334 U.S. 834. Similarly, in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, this Court granted a petition for a writ of certiorari to review a denial by the Court of Appeals of a writ of mandamus directed to a district judge. Accordingly, respondents' argument that "in substance this petition for certiorari is no more than an effort to obtain a review in this Court of an unappealable interlocutory orders of the District Court following failure to obtain such review from the Court of Appeals * * * and for all practical purposes [is] the equivalent of a petition for certiorari to the District Court under the All Writs Statute" (Res. Br. 10-11) is frivolous.

Interlocutory or final, intermediate or otherwise, this Court will grant certiorari to review an order of the Court of Appeals whenever it believes that the action below constituted so far a departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision. *E.g.*, *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.*, 148 U.S. 372, 384; *Beacon Theatres, Inc.* v. *Westover*, *supra*. Where the deviation results in a whittling away of this Court's certiorari jurisdiction, the need for supervision is clear. A writ of certiorari to review Question 5 of the Questions Presented should therefore be granted at this time. Cf. *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 689.

CONCLUSION

We submit that the Court of Appeals' action on September 23, 1959 (Pet. App. B) constituted a substantial amendment of the original determination below (Pet. App. A) and that all the Questions Presented are now ripe for

review by this Court. If we are wrong in this view, it is nevertheless clear that Questions 1, 4 and 5 of the Questions Presented should be decided now. Once the FCC has concluded hearings in the administrative proceeding—a proceeding which is wholly academic at this time—it will be too late to review the issues presented by these questions. At that point they will have been mooted.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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